United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,238

DISTRICT OF COLUMBIA,

Petitioner,

v.

CITIES SERVICE OIL COMPANY,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE DISTRICT OF COLUMBIA TAX COURT

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QUESTIONS PRESENTED

Where the District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a franchise tax upon all corporations engaged in trade or business in the District, but provides that the words "trade or business" shall not include income from sales of personal property by a corporation which does not have an office, warehouse or other place of business in the District, and does not have an agent or representative having an office or other place of business in the District, and where the District of Columbia Motor-Vehicle Fuel Importer's Act requires that foreign corporations make application, under oath, for a license to import motor-vehicle fuel into the District, and further requires such corporations to have a resident general agent in the District, and to name its resident general agent in its sworn application for importer's license,

The following questions are presented:

1. Is not the Telephone Answering Service, a partnership, with offices in the District, which accepts orders from respondent's customers for respondent's products, and which relays such orders to respondent's office in Virginia where such orders are filled and dispatched in the same manner as orders obtained by respondent's own salesmen, an office or other place of business of respondent in the District, or an agent or representative of respondent having an office or other place of business in the

District so that respondent's sales of personal property in the District are subject to franchise tax?

2. Is not Mr. E. C. Green, who operates a Cities Service gasoline station in the District, and who was described as respondent's "TBA agent", an agent or representative of respondent having an office or other place of business in the District and is not the service station operated by Mr. Green, at which is maintained a supply of tires, batteries and accessories which are then sold to respondent's customers in the District by respondent's own salesmen, a warehouse or other place of business in the District so that respondent's sales of personal property in the District are subject to franchise tax?

3. Is not respondent, having filed with the Assessor, for the purpose of securing a motor-vehicle fuel importer's license, sworn applications for the years 1952 and 1953, wherein respondent stated, as it had in prior applications for the same purpose, that respondent had a resident general agent in the District, and upon which statement it obtained the licenses and accepted the benefits it sought, estopped, for the purpose of avoiding liability to the District for corporation franchise taxes for the years 1952 and 1953, from denying that such an agent was in fact in the District during those years?

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No. 14,238

DISTRICT OF COLUMBIA,

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v.

CITIES SERVICE OIL COMPANY,

Respondent.

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This proceeding is to review a decision of the District of Columbia Tax Court, based upon its Findings of Fact and Conclusions of Law, which reversed a denial by the Assessor of claims for refund of corporation franchise taxes for the years 1952 and 1953, and ordered refunds of the entire amount of taxes paid by respondent. The decision of the District of Columbia Tax Court was entered on September 25, 1957 (P.A. 76).[1] Petition for review by this Court was filed on October 24, 1957 (P.A. 77).

The jurisdiction of this Court is invoked pursuant to the provisions

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1 The letters "P.A." refer to Petitioner's Appendix.

of Section 1, Title XV, Article 1 of the Act of July 16, 1947, 61 Stat. 359, ch. 258 (Section 47-1593, D. C. Code, 1951), and Sections 3 and 4, Title IX of the Act of August 17, 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223, as amended by Section 3 of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Sections 47-2403 and 47-2404, D. C. Code, 1951, Supp V).

STATEMENT OF THE CASE

Respondent, a Pennsylvania corporation with its principal office at 60 Wall Street, New York 5, New York, is engaged in the selling, both at wholesale and retail, of gasoline, oil, and other petroleum products and automobile tires, batteries and accessories (P.A. 56). Sales at wholesale are made by respondent to its dealers who operate the various Cities Service gasoline stations (P.A. 57). Respondent sells its products at retail to all commercial accounts in the District of Columbia, such as Embassy Dairy, Super Concrete and Capital Transit Company (P.A. 30). All of respondent's sales of its products and merchandise to gasoline station dealers and commercial establishments in the District of Columbia were effected by the solicitation and obtaining of orders by salesmen or solicitors employed and paid by respondent (Pet's. Ex. 3 and 4, P.A. 58). Respondent's products were delivered to the gasoline stations and commercial establishments in trucks owned by respondent and driven by its employees (P.A. 57).

Respondent leases or subleases (at less than the cost of rental to it)

a number of gasoline stations which it either owns or leases (P.A. 56, 57, Pet's. Ex. 12). The gasoline stations which respondent leased or subleased to its dealers were equipped with Cities Service machinery; i.e., lubricating machines, gas pumps, tanks for the storage of gasoline and other equipment (P.A. 15). Respondent loaned items of machinery, gas pumps and tanks to commercial establishments which purchased respondent's products (P.A. 51).

During the years 1952 and 1953, Mr. E. C. Green operated a Cities Service gasoline station at 4515 McArthur Boulevard, Washington, D.C. Respondent supplied tires, batteries, and accessories in quantity to Mr. Green, who "acted as sort of a wholesaler in supplying the other operators of Cities Service gasoline stations". The tires, batteries, and accessories which were supplied to Mr. Green were sold to the other Cities Service operators as a result of solicitation by salesmen in the employ of respondent (P.A. 57). Respondent attempted to offer certain documents to prove that Mr. Green was not respondent's agent, but these documents were excluded by the court for failure of proof (P.A. 71-76). Thereafter, respondent failed to introduce or offer any evidence to show that Green was not its agent.

Respondent employed four salesmen, one of whom lived in Maryland, two in Virginia and one in the District of Columbia (P.A. 58). These four salesmen effected the sale of Cities Service products to gasoline station

operators and commercial establishments by the solicitation and obtaining of orders from such operators and establishments. After obtaining an order, the salesman then forwarded it to the office of respondent in Virginia where it was accepted, filled and dispatched (P.A. 58). The salesman who resided in the District of Columbia was called a "merchandiser". His duties were to put up advertising displays in the various Cities Service gasoline stations throughout the District of Columbia (P.A. 17). He had no supervisor and only sporadically reported to the office in Virginia (P.A. 17-18). Respondent employed a maintenance crew consisting of three mechanics to service the Cities Service machiner which it rented to its gasoline station operators and loaned to commercial establishments purchasing Cities Service petroleum products (P.A. 15-16).

Respondent had arranged with Telephone Answering Service, a partnership, located in the Albee Building, Washington, D.C. for rendition to respondent of services (P.A. 1-3). Although a telephone provided respondent by the Service was listed as an emergency number, all orders for Cities Service products received by Telephone Answering Service from customers of Cities Service Oil Company were relayed to the manager of the Washington Division of that company. These telephone orders for Cities Service products were handled in the same manner as written orders and other orders obtained by respondent's salesmen (P.A. 4-6).

Several witnesses called by respondent testified that respondent had

no office, warehouse or place of business in the District of Columbia and the Tax Court so held. Respondent, for each of the years involved, voluntarily filed income and franchise tax returns in which respondent listed its income from sales within the District of Columbia as $985, 351. 22 for the year 1952, and $1, 034, 182. 36 for the year 1953. These returns were executed, under oath, by Mr. Ralph A. Cuthbertson, the then secretary of respondent. Taxes for the two years were computed by respondent on an apportionment basis and were paid. (P. A. 59-62, Pet's. Exs. 1 and 2). On the first page of each of the tax returns filed by respondent, the following appears: (Answers within parentheses were typed in by respondent)

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

- - - (CITIES SERVICE OIL COMPANY) - - - - - - - - - - - - - - -

D. C. Address - - - (5013 GEORGIA AVE., N.W. WASHINGTON) - - -
(Street and Number) (Zone)

Mailing Address - - - (70 PINE ST., - - - NEW YORK 5, N. Y.) - - -
(Street and Number) (City -Zone) (State)

Kind of Business: (PETROLEUM PRODUCTS) Number of places of business:

During the years 1952 and 1953, respondent imported gasoline and other petroleum products into the District of Columbia by virtue of annual licenses granted to it by the District. Each year, about a month and a half prior to the expiration of the current year's license, the Assessor,

D. C., sends out blank applications for licenses, in the form of questionnaires, to each importer (P.A. 53). Question number 12 on the application form is posed in the language following (Resp. Ex. D):

> "12. If foreign corporation, name and address of resident general agent in District of Columbia".

For a number of years respondent, through Mr. Ralph A. Cuthbertson, its then secretary, answered question number 12, under oath, as follows (J.A. 34, Resp. Ex. D):

> "Cities Service Oil Company,
> 5013 Georgia Avenue,
> Washington, D.C."

Question number 18 on the application for license as motor-vehicle fuel importer is as follows:

> "18. List on back all self-owned and self-operated service stations in District of Columbia". (Emphasis supplied)

In bold, black print across the top of the reverse side of the application for importer's license, appears the following statement:

> "LIST BELOW ALL BULK PLANTS, SELF-OPERATED SERVICE STATIONS, AND TERMINALS"

In answer to question number 18, and immediately below the foregoing statement, respondent answered under oath (Resp. Ex. D):

> "Various service stations in the District
> No storage in the District.

The Tax Court found that the petitioner had no office, place of business or

warehouse, nor any facility, nor owned, leased or operated any gasoline station at, nor had any connection with premises No. 5013 Georgia Avenue, Washington, D.C. (P.A. 59). Respondent's own records indicated that it owned a service station at 5013 Georgia Avenue (P.A. 19). The street number of the service station was incorrect, the correct address being 5001 Georgia Avenue (P.A. 19-20). The service station at 5001 Georgia Avenue was owned by respondent (P.A. 19-20).

Mr. Cuthbertson, notwithstanding the fact that he had sworn to respondent's franchise tax returns which stated that respondent's business address was 5013 Georgia Avenue, and notwithstanding the fact that he had executed, under oath, respondent's applications for importer's license which represented that respondent had a resident general agent at a Cities Service office at 5013 Georgia Avenue, testified that respondent had no office, warehouse or other place of business in the District of Columbia during the years involved (Tr. 181).

Respondent filed with the Assessor, D.C. timely claims for refund of the taxes now in question (Pet's. Ex. 3 and 4). The claims for refund were denied by the Assessor on October 4, 1956, and respondent filed a petition in the District of Columbia Tax Court to review the action of the Assessor in denying its claims for refund. The Tax Court, on July 15, 1957, rendered a decision, together with findings of fact and opinion, in favor of the District of Columbia (P.A. 72). Thereafter, Cities Service

Oil Company moved to reopen the hearing for the submission of additional evidence. That motion was granted and a further hearing was held (P.A. 73). On September 25, 1957, the Tax Court issued additional findings of fact and supplemental opinion on rehearing and entered its decision in favor of Cities Service Oil Company (P. A.73-76). This appeal followed.

STATUTES INVOLVED

Section 2, Title VII of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 345, ch. 258 (Section 47-1571a, D. C. Code, 1951), as amended, provides as follows:

> "For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under section 47-1554)."

Section 4(h), Title 1 of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 332, ch. 258 (Section 47-1551c(h), D. C. Code, 1951), as amended by Section 1 of the Act of May 3, 1948, 62 Stat. 206, ch. 246, provides as follows:

> "(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commerical activity in the District of Columbia; and include the performance of the functions of a public office: Provided, however, That the words 'trade or business' shall not include, for the purposes of this article--
>
> (1) Sales of tangible personal property whereby title to such property passes within or without the District, by

a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Section 3 of the Act of April 23, 1924, 43 Stat. 107, ch. 131 as amended by Section 3, Title III of the Act of August 17, 1937, 50 Stat. 677, ch. 690 (Section 47-1903(a), D. C. Code, 1951), provides, in pertinent part, as follows:

"Sec. 3(a) No person shall bring into, or produce, refine, manufacture, or compound in the District of Columbia motor-vehicle fuel to be used by him or to be sold, bartered, delivered for value, or exchanged for goods, and no person shall engage in the business of importer of motor-vehicle fuels in the District of Columbia unless such person is the holder of an unrevoked license authorizing him so to do issued by the Commissioners. The application for such license shall contain (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of

> the District of Columbia. In case the applicant is a corporation, the application shall also contain the corporate name, place, and time of incorporation, and the names of the officers and directors, and, if a foreign corporation, the name of its resident general agent, and in case the applicant is a partnership the names and addresses of the several persons constituting the partnership. Such application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. * * *".

Section 18 of the Act of April 23, 1924, 43 Stat. 110, ch. 131 (Section 47-1916, D. C. Code, 1951), provides as follows:

> "That the Commissioners may make such regulations as in their judgment are necessary for the administration of this Act and may affix thereto such fines and penalties as in their judgment are necessary to enforce such regulations (in cases in which a penalty is not otherwise provided by law)."

Sections 2 and 3, Article 26 of the Police Regulations promulgated by the Commissioners of the District of Columbia, effective December 2, 1942, provide as follows:

> "Sec. 2. Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia, and every change of address shall be reported within 10 days of such change to the Assessor of the District of Columbia.
>
> "Sec. 3. Where motor vehicle fuel is resold or transferred by the licensed importer into other jurisdictions, official copies of delivery tickets or sales invoices shall be kept in the local office. Records of sales directly to an agency of the U. S. Government or District of Columbia Government shall be maintained

by the local office. Exemption certificates furnished retailer at the time of sale, when properly executed, shall be accepted by the importer and be attached to its monthly returns to the Assessor."

STATEMENT OF POINTS

1. The Tax Court erred in holding that respondent did not have an office, warehouse or other place of business in the District or an agent or representative having an office or other place of business in the District, and, for that reason, that respondent is not liable to District of Columbia corporation franchise tax on sales of personal property made by it in the District.

2. The Tax Court erred in holding that respondent, having secured licenses to import motor-vehicle fuel into the District on the basis of applications executed under oath by officers of respondent, which contained representations to the Assessor that respondent had a resident general agent in the District as required by law, and having accepted all the benefits from the grant of such licenses, was, nevertheless, not estopped to deny that it had a resident general agent in the District during the years involved.

3. The Tax Court erred in refusing to permit petitioner to introduce in evidence the sworn applications for motor-vehicle fuel importer's license filed by respondent for each and every year it secured from the District a license authorizing such fuel importation.

4. The Tax Court erred in refusing to permit petitioner to introduce in evidence corporation franchise tax returns filed by respondent for years

other than the years in question.

SUMMARY OF ARGUMENT

The District of Columbia Income and Franchise Tax Act of 1947, as amended, imposes a tax on the net income from District sources of foreign and domestic corporations for the privilege of engaging in any trade or business within the District of Columbia. The words "trade or business" do not include income from sales of tangible personal property by a corporation which does not have an office, warehouse or other place of business in the District, or an agent or a representative having an office or other place of business in the District. The District of Columbia Tax Court erroneously held that respondent was not liable for District corporation franchise taxes for the years 1952 and 1953 on sales by it of its products in the District because that corporation, although engaging in business in the District in the importation, solicitation and sale of motor-vehicle fuel and related products, did not have an office, warehouse, or other place of business in the District, or an agent or representative having an office in the District or other place of business in the District.

Respondent's contractual relationship with Telephone Answering Service, a partnership, with offices in the District of Columbia, whereby the Service accepted orders from respondent's customers for respondent's products and relayed those orders to the Operations Supervisor of respondent's Washington Division who filled such orders and dispatched the products to

respondent's customers in the District of Columbia, constituted the Telephone Answering Service as either an office or other place of business of respondent in the District, or an agent or representative of respondent having an office or other place of business in the District. The orders for respondent's products received by Telephone Answering Service were handled in the same manner as other orders received from respondent's customers by respondent's own salesmen.

Respondent adduced evidence to the effect that a Mr. E. C. Green operated a Cities Service gasoline station in the District of Columbia, and that orders obtained by respondent's salesmen were filled by respondent from supplies of merchandise, other than petroleum products, maintained by Mr. Green who was described as respondent's "TBA Agent" (a derivation from the words tires, batteries, and accessories). No evidence was introduced by respondent establishing that Mr. Green was not, in fact, an agent of respondent in the District of Columbia who, on behalf of respondent, represented and warehoused respondent's products. The District of Columbia Tax Court erred in failing to hold that Green was respondent's agent, and that the Cities Service station operated by Green was a warehouse of respondent in the District of Columbia.

The applicable statute requires every importer into the District of motor-vehicle fuel to make written application under oath annually for an importer's license, and requires foreign corporations making application to

have a "resident general agent" in the District of Columbia. Respondent, for a number of years, and for each of the years involved, consistently represented on applications filed by it with the District (which the Tax Court erroneously excluded from evidence) that Cities Service Oil Company at 5013 Georgia Avenue, N.W., Washington, D.C., had a resident general agent and the Assessor, relying on such representations, each year granted respondent an importer's license. In addition, respondent, in corporation franchise tax returns filed by it for the years 1952 and 1953 and for other years (which the Tax Court erroneously excluded from evidence) stated, under oath, that its business office in the District of Columbia was 5013 Georgia Avenue, N.W., Washington, D.C. Respondent, by claiming in this case that it had no resident general agent or office in the District during the years involved, took a position inconsistent with the position it took each year it made application for an importer's license. Having accepted all of the benefits from the grant to it of a license to import motor-vehicle fuel into the District, respondent is now estopped from repudiating or contesting the provisions of the statute, or the implementing regulations promulgated pursuant thereto, under which it secured the privilege to import motor-vehicle fuel into the District, the exercise of which led to the receipt of such benefits.

One of the questions on the application for importer's license asked for the name and address of respondent's resident general agent in the

District. If respondent, in fact, had no such agent in the District, it was under a duty so to inform the Assessor, and its answer to such question should have been "NONE". Any other answer, in view of the position taken by respondent in this case, can only be construed as an attempt on the part of respondent, which proved successful, to misrepresent the true fact.

That foreign corporations are, by the force of the provisions of a particular licensing act under which they secure the right to do business in the District, brought within the scope of other District statutes does not thereby nullify the provisions of the licensing act, or relieve such corporations from the requirements of other statutes. Therefore, the fact that foreign corporations importing motor vehicle fuel into the District must have a resident general agent in the District of Columbia, and that they thereby become liable to pay corporation franchise taxes, is a natural consequence of their right to import motor vehicle fuel into the District of Columbia. Congress clearly has the right to impose any conditions it may choose upon foreign corporations seeking a license to do business in the District of Columbia. The decision of the District of Columbia Tax Court should be reversed.

ARGUMENT

I

RESPONDENT HAD AN OFFICE, WAREHOUSE OR OTHER PLACE OF BUSINESS IN THE DISTRICT, AND HAD AN AGENT OR REPRESENTATIVE HAVING AN OFFICE OR OTHER PLACE OF BUSINESS IN THE DISTRICT.

A. Telephone Answering Service

Respondent had contracted for the services of Telephone Answering Service, a partnership, with offices in the Albee Building, Washington, D. C. (P.A. 1-3). Although a telephone provided by the Service was listed as respondent's emergency number, Telephone Answering Service received and relayed all orders for Cities Service products from customers of Cities Service calling this number.

Section 47-1551c(h), supra, states in pertinent part as follows:

> "* * * Provided, however, That the words 'trade or business' shall not include * * *
>
> "(1) Sales of tangible person property * * * by a corporation * * * which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District * * *"

Respondent's Telephone Answering Service constituted an office or other place of business which respondent maintained in the District of Columbia. At the very least, Telephone Answering Service was its agent or representative in the District for the purpose of accepting orders

and the receipt of other business communications.

Telephone Answering Service supplied the same service to respondent as respondent's salesmen. The operations supervisor of the Washington Division testified that respondent's salesmen solicited orders from customers in the District of Columbia and either physically forwarded such orders to the Virginia office or telephoned the orders to the Virginia office. (P.A. 46) The orders were filled and dispatched to customers in trucks of the respondent loaded at its storage facilities in Virginia. (P.A. 5). It was unequivocally testified by Mr. Himes, a witness for respondent, that orders received by respondent via the Telephone Answering Service were handled in exactly the same manner as orders received by respondent's own salesmen (P.A. 4-6).

Respondent has, in the Telephone Answering Service, all of the benefits flowing from the establishment of a permanent salesman and office in the District of Columbia. Subsections 1 and 2 of Section 47-1551c(h), supra, were intended to exclude from the payment of the franchise tax only those corporations whose business activities in the District of Columbia were casual. The intent of Congress in enacting these subsections is clearly expressed in Senate Report No. 1042, 80th Congress, which accompanied S. 2409, which was enacted as the Act of May 3, 1948, 62 Stat. 206, ch. 246. The Report reads as follows:

> "The purpose of the bill is to clarify and limit the imposition of a tax upon the income of corporations or businesses which is 'derived from sources within the District of Columbia.' Due to the language appearing in the existing District of Columbia income-tax law, the imposition or assessment of the income tax was heretofore made against concerns casually engaged in business within the borders of the District of Columbia by such means as telephone, mail orders, traveling salesmen, and other nonconsistent means of solicitation. This bill will correct such situation, and limit the imposition of an income tax to those concerns factually engaged in business on their own account or through representatives or agents within the District of Columbia." (Emphasis supplied)

The establishment of an office in the District or the hiring of an agent or representative with an office in the District for the furtherance of respondent's business cannot be said to be casual. In view of the foregoing, the Tax Court erred when it held that respondent had no agent and no office in the District of Columbia and cancelled assessments of corporation franchise taxes against respondent. The decision of the Tax Court should be reversed, and the assessments affirmed.

B. Mr. E. C. Green is respondent's agent or representative in the District having an office or other place of business in the District

Mr. E. C. Green is one of respondent's gasoline station dealers operating a station at 4515 MacArthur Boulevard, Washington, D. C. Green was supplied by respondent with tires, batteries and accessories in quantity. (P.A. 7) The Manager of the Washington Division first testified that Mr. Green was respondent's "TBA agent". (P.A. 6-7)

Subsequent to this testimony, respondent sought to introduce documentary evidence to prove that Green bought and sold for his own account and was not respondent's agent. This evidence was excluded by the Tax Court, upon objection of counsel, for a complete failure of proof (P.A. 71-76). Thereafter, respondent failed to introduce or offer any evidence to prove that Green was not in fact respondent's agent. Serious doubt having been cast upon the position of Green in relation to respondent, it became respondent's burden to clear up this doubt. The Tax Court in its Findings of Fact could only find that Green "acted as sort of a wholesaler in supplying the operators of gasoline stations". The Tax Court erred when it found that Green purchased the merchandise from the respondent, and that he was not employed by respondent (P.A. 57). There is absolutely no competent evidence in this record to support these findings. In its opinion, the Tax Court elaborated upon its findings in regard to Green and held that "The transaction between Green and the petitioner was a sale transaction with title passing to the former. He was not an agent or representative of the petitioner." The Tax Court further held that Green then resold the merchandise to the other gasoline station operators as they needed it "somewhat as a jobber or a wholesaler." (P.A. 65-66). There is no competent evidence in this record to support such statements.

The evidence which respondent sought to introduce before the Tax Court, and which was excluded by the Tax Court upon objection of counsel

for petitioner, was intended to show the manner in which Green took possession or title to the tires, batteries and accessories of respondent. (P.A. 71-76) No other evidence on this point was thereafter offered by respondent. Respondent introduced no agreements between respondent and Green as to the nature of their relationship, and no person in a position to know the true facts was offered as a witness by respondent. The Tax Court was clearly incorrect in filling in this gap in respondent's evidence. It will be noted that after the proviso of Section 47-1551c(h), supra, the following appears:

> "For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Green does not solicit sales of the products which he holds for sale. To the contrary, however, sales of tires, batteries and accessories to Cities Service customers and service station operators from the supply maintained by Green result from the solicitation and taking of orders by respondent's own salesmen. (P.A. 57) These facts are not consistent with a conclusion that Green is an independent broker. It would seem that he is entirely dependent.

The Cities Service station operated by Green would, in view of the testimony, appear to be a Cities Service warehouse in the District of Columbia.

ARGUMENT

II

RESPONDENT IS ESTOPPED TO DENY THAT IT PHYSICALLY HAD OR MAINTAINED AN OFFICE, WAREHOUSE, OR OTHER PLACE OF BUSINESS IN THE DISTRICT, OR AN AGENT OR REPRESENTATIVE HAVING AN OFFICE OR OTHER PLACE OF BUSINESS IN THE DISTRICT.

Section 2, Title VII, of the District of Columbia Income and and franchise Tax Act of 1947, as amended, 61 Stat. 345, ch. 258 (Section 47-1571a, D. C. Code, 1951),imposes a tax on the net income from District sources of foreign and domestic corporations "For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District * * *". Section 4, Title I, of the Act (Section 47-1551c(h), D. C. Code, 1951) defines "trade or business" as follows:

> "(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, * * * or commercial activity in the District of Columbia; * * * Provided, however, That the words 'trade or business' shall not include * * *
>
> "(1) Sales of tangible personal property * * * by a corporation * * * which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, * * *
>
> "For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

Respondent is a foreign corporation engaged in the trade or business of importing into the District of Columbia, for sale therein, motor-vehicle fuel and other petroleum and automotive products. It is also in the business of leasing and subleasing gasoline stations (P.A. 69). Its petroleum and related automotive products were sold in the District through the efforts of salesmen employed by respondent. Through the solicitation of these salesmen, respondent's net sales within the District of Columbia amounted to $975,351.22 in 1952 (P.A. 61, Pet's Ex. 1), and $1,304,182.38 in 1953 (P.A. 62, Pet's Ex. 2). There can be no doubt, therefore, that respondent was, during those years, engaged in a "trade or business" in the District of Columbia since it carried on extensive commercial activity in the District. Owens Illinois Glass Co. v. District of Columbia, 92 U.S. App. D.C. 15, 204 F. 2d 29; Lever Bros. Co. v. District of Columbia, 92 U.S. App. D.C. 147, 204 F. 2d 39.

Respondent voluntarily filed corporation franchise tax returns for the years 1952 and 1953 executed under oath by Mr. Ralph A. Cuthbertson, its secretary. Because it was engaged in business both within and without the District of Columbia, respondent, on its franchise tax returns, computed its franchise tax liability to the District on an apportionment basis (P.A. 61-62, Pet's. Exs. 1 and 2). On August 17, 1953, respondent paid its franchise tax for the year 1952 in the amount of $5,145.24, together with interest in the amount of $106.57, or a total

of $5,251.81 (P.A. 59). On August 16, 1954, respondent paid its franchise tax for the year 1953 in the amount of $2,882.01, together with interest in the amount of $57.64, or a total of $2,939.65 (P.A. 61).

On January 3, 1956, petitioner filed with the Assessor claims for refund of the aforesaid franchise taxes and interest on the ground (1) that it did not physically have or maintain an office, warehouse, or other place of business in the District of Columbia and (2) that it had no officer, agent or representative having an office or other place of business in the District of Columbia (Pet's Ex. 3 and 4). On October 4, 1956, the claims for refund were denied by the Assessor (P.A. 61).

Section 3(a) of the Act of April 23, 1924, 43 Stat. 107, ch. 131 (Section 47-1903(a), D. C. Code, 1951) states that no person shall import motor-vehicle fuel into the District of Columbia to be sold therein or engage in the business of importer of motor-vehicle fuels unless such person is the holder of a license authorizing him so to do. Section 47-1903(a), D. C. Code, 1951, requires applicants to make application, under oath, for an importer's license, and provides, in pertinent part, as follows:

> "* * * The application for such license shall contain * * *. In case the applicant is a corporation, the application shall also contain the corporate name, place, and time of incorporation, and the names of the officers and directors, and, if a foreign corporation, the name of its resident general agent, * * *. Such application shall be signed and sworn to by * * * the president and secretary

> of the corporation, or by its manager or resident general agent, if owned by a corporation." (Emphasis supplied)

Section 47-1904, D. C. Code, 1951, provides for the filing of sworn reports of fuel sold by each importer engaged in the sale of motor-vehicle fuels in the District of Columbia. Such section provides, in pertinent part, as follows:

> "* * * Such report shall be sworn to by one of the principal officers in case of a domestic corporation, by the resident general agent, or attorney in fact, or by a chief accountant or officer in case of a foreign corporation * * *." (Emphasis supplied)

The word "the" immediately preceding the words "resident general agent" indicates quite clearly that Congress assumes, in the case of a foreign corporation, the existence of a resident general agent pursuant to its mandate contained in Section 47-1903(a), supra.

Section 47-1907, D. C. Code, 1951, provides as follows:

> "The records of all purchases, receipts, sales, other dispositions, and uses of motor-vehicle fuel of every importer, distributor, or dealer shall, at all times during the business hours of the day, be subject to inspection by the assessor and the collector of taxes of the District of Columbia, or by their duly authorized agents or by any other agent duly authorized by the Commissioners to make such inspection."

This section clearly presupposes the existence of an office in the District of Columbia wherein the records of the importer referred to therein will be maintained. Section 47-1916, D. C. Code, 1951, authorizes the Commissioners of the District of Columbia to make such regulations as

are necessary for the administration of the Act of April 23, 1924, supra.

Effective December 2, 1942, the Commissioners promulgated Article 26 of the Police Regulations of the District of Columbia consisting of nine sections.

Section 2 of Article 26 provides as follows:

> "Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia, and every change of address shall be reported within 10 days of such change to the Assessor of the District of Columbia." (Emphasis supplied)

Section 3 of Article 26 provides, in pertinent part, as follows:

> "Where motor-vehicle fuel is resold or transferred by the licensed importer into other jurisdictions, official copies of delivery tickets or sales invoices shall be kept in the local office. Records of sales directly to an agency of the U. S. Government or District of Columbia Government shall be maintained by the local office. * * *" (Emphasis supplied)

The application form for a license to import motor-vehicle fuel for each of the years 1952 and 1953 was a questionnaire. Question No. 12 of the application reads as follows: (Resp. Ex. D)

> "12. If foreign corporation, name and address of resident general agent in District of Columbia".

Respondent's answer under oath to this question in each of the applications filed by it for the years 1952 and 1953 was the following:

> "Cities Service Oil Company 5013 Georgia Avenue, Washington, D. C."

Question No. 18 of the application for license as motor fuel importer is as follows:

> "18. List on back all self-owned and self-operated service stations in District of Columbia." (Emphasis supplied)

In bold, black print across the top of the reverse side of the application for importer's license appears the following statement:

> "LIST BELOW ALL BULK PLANTS, SELF-OPERATED SERVICE STATIONS, AND TERMINALS"

In answer to question No. 18, and immediately below the foregoing statement, respondent answered: (Resp. Ex. D):

> "Various service stations in the District
> No storage in the District."

The applications filed by respondent were sworn to by Mr. Ralph A. Cuthbertson, its secretary. The Tax Court erred in refusing to permit petitioner to introduce in evidence, for the purpose of showing the consistent position taken by respondent with regard to the naming of its resident general agent, applications for importer's licenses filed by respondent for each year it was engaged in business in the District. These applications, which were in the possession of the Assessor, would have shown that in every application ever filed by respondent it listed 5013 Georgia Avenue as the address of its resident general agent. Since the Assessor granted respondent an importer's license for each of the years 1952 and 1953, and for every other year in which respondent was engaged

in business in the District, he determined that respondent met all the statutory and regulatory requirements for such license. He concluded that respondent's answer to question 12 on the application for license meant that respondent had an office at 5013 Georgia Avenue at which was located the agent required by the statute.

This conclusion by the Assessor was entirely warranted in view of respondent's answers to question 18 appearing on the reverse side of the application forms. Respondent had clearly stated on those applications that it owned and "self-operated" various service stations in the District. Of course, if respondent operated its own service stations in the District it would clearly be subject to the franchise tax since a service station is an office or place of business.

The corporation franchise tax returns, also executed under oath by its secretary, Mr. Cuthbertson, filed by respondent for the years in question contain, on page 1 thereof, the following information (answers within parentheses were typed in by respondent):

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

- - - (CITIES SERVICE OIL COMPANY) - - - - - - - - - - - - - - - -

D. C. Address - - - (5013 GEORGIA AVE., N.W. WASHINGTON) - - -
(Street and Number) (Zone)

Mailing Address - - (70 Pine St., NEW YORK 5, N.Y.) - - -
(Street and Number) (City-Zone) (State)

Kind of Business: (PETROLEUM PRODUCTS) Number of places of business:

The foregoing points up the consistency of respondent in representing to the Assessor that it had a business office in the District at 5013 Georgia Avenue, and the inconsistency of its present position that it had no office in the District. The Tax Court refused to permit petitioner to introduce in evidence corporation franchise tax returns filed by respondent for other years. Petitioner submits that the Tax Court erred in this regard. This evidence would have shown that respondent voluntarily filed corporation franchise tax returns, and paid the taxes computed thereon, for years other than 1952 and 1953. These other returns would also have shown

that 5013 Georgia Avenue was respondent's business address.

Respondent, during the years 1952 and 1953, was permitted to import motor-vehicle fuel into the District of Columbia by virtue of licenses so to do granted to it by the District. The issuance to respondent of licenses to import motor-vehicle fuel into the District was based upon its answers to questions contained in its sworn applications for such licenses. Having applied for licenses to import motor-vehicle fuel under the Act of April 23, 1924, supra, and having obtained and retained benefits from its operations under such licenses, respondent is now estopped from attacking the Act of Congress or any of the provisions thereof, or any lawful regulations adopted pursuant thereto, under which it obtained such licenses.

In 19 Am. Jur., Estoppel 682, the following quotation appears:

> "§64. Acceptance of Benefits.--Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions, and it has been said that such cases are referable, when no fraud either actual or constructive is involved, to the principles of election or ratification rather than to those of equitable estoppel. The result produced, however, is clearly the same and the distinction is not usually made. Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction in so far as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation. * * *". (Emphasis supplied)

Cases too numerous for citation here provide ample support for the foregoing statements, and are cited in footnotes to the above quotation.

In Pierce Oil Co. v. Phoenix Refining Co. (1922), 259 U.S. 125, 66 L. Ed. 855, 42 S. Ct. 440, it appeared that the statutes of the State of Oklahoma declare that no corporation should have the right to engage in the business of transporting petroleum through pipe lines within the state and that every corporation engaged in such business should be deemed a common carrier thereof. The Supreme Court stated at page 128:

> "This constitution and these laws had been in effect for five years when the Pierce Company, by applying for and obtaining the privilege of conducting its business operations within the State, elected to respect and obey them, and therefore when it engaged in the business of transporting crude petroleum through pipe lines in the State it must necessarily be subject to the duties and obligations of 'a common carrier thereof as at common law' * * *.
>
> "When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered * * * the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself * * * deprives it of its property without due process of law must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U.S. 56, 66), and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the State, is unconstitutional. * * *
>
> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." (Emphasis supplied)

See also: Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, 36 L. Ed. 164, 12 S. Ct. 403. The Motor-Vehicle Fuel Tax Act of April 23, 1924, supra, had been in effect for more than ten years when respondent first made application for a license to import motor-vehicle fuel into the District. The exempting provisions of Section 47-1551c(h), supra, which excludes from the franchise tax income from the sale of tangible personal property where the corporation does not have an agent or an office in the District, did not become law until the Act of May 3, 1948, 62 Stat. 206, ch. 246, was enacted. It is, therefore, readily seen that the requirement of a resident general agent, in the case of foreign corporations desiring to import motor-vehicle fuel into the District, had no tax consequences when enacted. In 1952 and 1953, however, the 1948 amendment had been in effect for so long a period of time that respondent knew of its enactment when it made application for importer's licenses for the years involved, and, in fact, filed corporation franchise tax returns for those years.

There can be no doubt that foreign corporations desiring to import motor-vehicle fuel into the District of Columbia are aware that under the provisions of the Act of April 23, 1924, supra, they become liable not only for the motor-vehicle fuel tax, but, by the force of such provisions, supplemented by consistent Police Regulations, are brought within the scope of other statutes of the District. In other words, the mandatory requirement that foreign corporations importing motor-vehicle fuel into

the District have a resident general agent in the District effectively brings these corporations within the provisions of the District of Columbia Income and Franchise Tax Act of 1947, supra. Respondent accepted these conditions in order to obtain the authority to import motor-vehicle fuel into the District. That Congress has the right to impose any conditions it chooses upon foreign corporations desiring a franchise in the District of Columbia, or to exclude them altogether, is not open to question since, under the Constitution of the United States, Congress alone has the power to legislate for the District of Columbia and to regulate interstate commerce.

During the years 1952 and 1953, respondent exercised the privilege granted to it, and reaped great rewards from the sales of its products in the District. Now, several years later, respondent, for the first time, alleges that during the years 1952 and 1953 it failed to comply with the requirement of the Act of Congress under which it secured its importer's license that it have a resident general agent in the District. Therefore, respondent contends, it is not liable for the franchise taxes in issue. Respondent is guilty of wrongdoing; i.e., importing motor-vehicle fuel into the District of Columbia without complying with the condition prescribed by Congress that it have a resident general agent in the District. That it has profited by its wrongdoing is apparent from the fact that its net sales of its products in the District in 1952 amounted to $975,351.22, and in 1953, to $1,304,182.38 (Pet's. Exs. 1 and 2, P.A. 59-62). Respondent

seeks by this action to profit further from its own wrongdoing by avoiding payment of a franchise tax which every other importer, because they complied with the law, has paid. To allow respondent to succeed would be to defeat the ends of justice, and subvert the principles of equity.

In its annual applications for importer's license, respondent consistently represented that it had a "resident general agent" in the District of Columbia. Respondent, since it is a foreign corporation, is required by Section 47-1903(a), supra, to have such an agent in the District of Columbia, and is required to have a local representative and maintain a local office in the District by Section 2 of Article 26 of the Police Regulations, supra. But for the fact that the Assessor, D.C. accepted respondent's answers to question number 12 on the applications filed by it as stating that respondent physically maintained its office in the District of Columbia, where there was located respondent's resident general agent, respondent's application would have been denied. Respondent is chargeable with knowledge of the provisions of the Act under which it made application for a license to do business in the District of Columbia. Respondent, therefore, knew that it must name a resident general agent to act for it in the District of Columbia. With this provision of law in mind, and in light of the fact that a negative answer to question number 12 would have resulted in a prompt denial of its application for an importer's license, it is easy to see why respondent answered question number 12 as it did.

Q. No, I'm asking you the answer to factual questions.

THE COURT: Mr. Cuthbertson, he is asking from your own knowledge, and of course, you can only testify to your own knowledge, he wants to know whether those answers are true or false as far as you know?

MR. COLIN: Your Honor, may we have the witness' attention directed to a particular answer rather than to the entire page? I think that would be more pointed.

THE COURT: I don't think that is necessary.

MR. EHRIG: Ask for the entire document, first?

THE COURT: You can call his attention, if you want to, in cross-examination to any question.

THE WITNESS: I observe that this is the City Service Oil Company report, their address is correct, the name and titles of the officers and directors as shown are correct. There is nothing on there that I observe that is incorrect, to the best of my knowledge.

BY MR. EHRIG:

Q. Those statements are all true?

A. I believe so.

Q. In the year 1952, were they correct?

A. I don't know when it was filed. Does it show? Yes, 1952. It should have been true then.

Q. Would those statements have continued to be true for the year 1953?

A. I don't know what changes might have been made in the year '52 or '53.

Q. In regard to '53, sir, did you say you knew of no change?

A. I can't remember that there would be any change.

* * *

Q. Now, sir, for the continuing years after this application in 1952, were any material changes made?

A. We have occasional change of officers and directors.

Q. Other than the officers and directors in this?

A. No change that I can remember.

Q. Up to the present time?

A. We changed our type of operation and our physical area of divisions several times. I don't remember when they were changed." (Emphasis supplied)

* * *

Mr. Cuthbertson was the only officer of respondent to testify at the trial of this case. Counsel for petitioner gave Mr. Cuthbertson every opportunity to explain the consistent listing, in respondent's applications for importer's licenses and corporation franchise tax returns, executed under oath by him, of 5013 Georgia Avenue as the business address of respondent and the address of its resident general agent, but no explanation was forthcoming.

Respondent, prior to obtaining a license to import motor-vehicle fuel into the District of Columbia, is required to file with the Commissioners of the District a bond payable to the District of Columbia in the approximate

sum of three times the average monthly motor-vehicle fuel tax during the next preceding 12 months to be executed by a surety company licensed to do business in the District, and conditioned generally upon faithful compliance by the applicant or importer with the terms of Sections 47-1901 thru 47-1916, D. C. Code, 1951. No bond shall be less than $5,000 nor more than $20,000. (Section 47-1903(a), D. C. Code, 1951). The bonds filed on behalf of Cities Service Oil Company are each in the amount of $20,000 (Resp. Exs. M and N). These bonds show that, in addition to the Assessor's acceptance of the answers made by respondent in its applications for importer's license, a commercial bonding company also accepted the answers made by respondent to mean that respondent was in compliance with all statutory and regulatory requirements, and separately guaranteed that the oil company would continue to remain so.

Respondent's present position, that it had no office and no agent having an office in the District of Columbia in 1952 and 1953, is inconsistent with the position it took during those years, and the position it took each year it applied for its motor-vehicle fuel importer's license.

In Houston Production Co. v. United States, 4 F. Supp. 715, the court, at page 717, stated:

> " 'Taxation', as it has been said many times, is an eminently practical matter. Tyler v. U. S., 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991, 69 A.L.R. 758. Because it is, it has been generally considered that 'where the government and the taxpayer, by acquiescence in the manner of performing an act, have given a definite character and effect to it, the taxpayer will not be permitted, after deriving benefits from this acquiescence, to deny this character and effect to it, or to change his position at the government's expense.' Hartwell Mills v. Rose (C.C.A.) 61 F. (2d) 441, 444." [Emphasis supplied]

And in the case of Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, the Supreme Court, at page 680, stated:

> " * * * Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." [Emphasis supplied]

See also: Berman v. Griggs, 145 Me. 258, 75 A. 2d 365, 368.

It would be unconscionable and unreasonable to allow respondent to escape taxation on the theory that it had no office or agent in the

District when its right to import motor-vehicle fuel into the District was obtained on the strength of a representation under oath to the Assessor that it had a "resident general agent" in the District and that it maintained a local office in the District. No clearer case of estoppel could possibly be presented.

The cases which have developed the theory of estoppel are legion, and embrace every conceivable aspect of law. Estoppel in pais, or equitable estoppel, is invoked in a variety of situations and in any case where it would be inequitable or unjust to allow one to profit by his own wrongdoing. To allow one person (as in this case) to represent the existence of certain facts, induce another to rely upon such representations, achieve benefits as a result, and thereafter, to deny the reality of those representations while retaining the benefits, would manifestly be inequitable and unjust, and in such a situation the law requires that the prior representations be taken as the real truth.

The District of Columbia Tax Court was of the opinion that the doctrine of estoppel was not applicable to the present situation and, in its opinion, stated (P.A. 68):

> "There was no misrepresentation. The Assessor or his office knew that the petitioner was not, and could not be its own 'resident general agent' for the purposes of the motor fuel tax and importing law. Both the petitioner and the Assessor or his office were wrong in the matter. When it appeared that the petitioner had failed to answer the pertinent question correctly, the Assessor or his office should have re-

> turned the application for proper preparation. Apparently the matter of the petitioner having a 'resident general agent' was of little interest. Certainly no reliance could have been placed on the statement. The petitioner or its officers, if credit can be given them for any common sense, did not intend the Assessor to rely upon such statement. * * * " [Emphasis supplied]

The Tax Court's statement to the effect that the Cities Service Oil Company and its officers "if credit can be given them for any common sense," did not intend the Assessor to rely upon their sworn answers in the applications for importer's license makes a mockery of sworn statements and the requirement of swearing to applications for any license. The Congress of the United States obviously requires applicants for importer's licenses to file sworn applications for the same reason that courts require witnesses to be put under oath before giving testimony. Penalties are provided by law for false swearing in applications for motor vehicle fuel importer's license, and it is this sanction which induces public officials to place reliance upon such sworn statements.

The Tax Court further states that there was no misrepresentation because, as a matter of law, Cities Service Oil Company could not be its own resident general agent. But the Tax Court apparently failed to consider the fact that the company could and did state that it was itself located on Georgia Avenue where, by necessity, it could act only through an agent. The Tax Court seems to hold that since it had determined that a corporation could not act as its own resident general agent, the Assessor

could not be held to any lesser standard of knowledge than the Tax Court. In other words, the Assessor, just as the Tax Court, should have found that the sworn answer was legally incorrect. The Assessor would be bound to know the law on a question which has plagued bench and bar for a period of years, i.e., what constitutes an agent. The vast amount of litigation on the subject bears witness to the complexity of the problem. Obviously, the respondent is the only party herein in a position to know its own agents. In Parker v. Sager, 85 U. S. App. D.C. 4, 174 F. (2d) 657, this Court stated that:

> "* * * The essential elements of equitable estoppel as related to the parties estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert. * * *" (Emphasis supplied)

Respondent 's answer to question number 12 was calculated to, and did, convey the impression that the fact was otherwise than that which respondent now attempts to assert. The answer quite plainly amounted to a concealment of the material fact. If respondent had been unsuccessful in conveying the impression that it had a resident general agent in the District of Columbia, its applications for importer's license would have been denied by the Assessor.

The Tax Court was of the opinion that both respondent and the Assessor were wrong in failing to catch what the Tax Court concluded

was an error in respondent's applications for importer's license. This Court in Bowen v. Howenstein (1913), 39 App. D. C. 585, stated at page 587 as follows:

> "The doctrine of estoppel in pais is founded upon principles of morality, and is intended to subserve the ends of justice. 'It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party when in conscience and honesty he should not be allowed to speak.' Van Rensselaer v. Kearney, 11 How. 297, 326, 13 L. ed. 703, 715.
>
> * * *
>
> 'In Morgan v. Chicago & A. R. Co. 96 U. S. 716, 720, 24 L. ed. 743, 744, the court said: 'The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.'
>
> "Of course, where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss, even though there is neither actual nor constructive fraud. Brant v. Virginia Coal & I. Co., 93 U. S. 326, 336, 23 L. ed. 927, 929." [Emphasis supplied]

As between the Assessor and Cities Service Oil Company, it is clear that respondent was in possession of the true facts relative to the existence of a resident general agent in the District of Columbia. If it had no resident general agent and no office where its agents acted for it, it should have so stated.

CONCLUSION

In view of the foregoing, the decision of the District of Columbia Tax Court ordering refunds of the entire amount of taxes and interest paid for each of the years involved should be reversed.

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

28 ROBERT H. PYKE

was called as a witness for the petitioner and, having been duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the reporter.

THE WITNESS: Robert H. Pyke, Massapeau, New York.

DIRECT EXAMINATION

BY MR. COLIN:

Q Mr. Pyke, you are employed by City Service Oil Company, the petitioner herein? A. Yes, sir.

Q. In what capacity? A. As a tax accountant in the General Office's Tax Department.

Q. How long have you been so employed?

THE COURT: I did not get his position.

THE WITNESS: Tax accountant -- about 10 years in that capacity.

* * *

38 MR. THOMAS L. SMITH, JR.

was called as a witness for the petitioner and having been duly sworn, was examined and testified as follows:

THE COURT: Give your full name and address?

THE WITNESS: Thomas L. Smith, Jr.; business address, 412 Albee Building, Washington, D. C.

DIRECT EXAMINATION

BY MR. COLIN:

Q. Mr. Smith, you are affiliated with the Telephone Answering Service in the District of Columbia? A. I am, sir.

Q. What is your connection there? A. I'm the partner and general manager.

Q. During the years 1952 and '53, did your Company render telephone answering service to the petitioner here, the City Service Oil Company? A. We did during the summer months, yes, or the winter months -- I'm sorry.

Q. Will you describe the nature and substance of that service, Mr. Smith? A. Well, actually, what we did for the City Service people was to provide a phone number which they listed for night, Sunday and holiday emergency service calls. In other words, anyone calling their particular number and getting no answer, would call the number listed for our office and we simply took the emergency service call and called the service man or he kept in touch with us or where he was so we could reach him.

* * *

BY. MR. COLIN:

Q. Did your Company deal in any other way with the messages that came in to you? A. No, sir, just took them and despatched them.

* * *

CROSS-EXAMINATION

BY. MR. EHRIG:

Q. I just have a couple of questions. Did you say you provide emergency telephone service to City Service? A. We took emergency calls.

Q. Didn't you take any calls? Did they have to be emergency? A. Oh, any calls that could wait until morning were simply referred to the office.

Q. You took the calls, nevertheless? A. No, we don't, in many practices.

Q. What you mean is anyone could call you for City Service? A. Yes.

Q. Wasn't necessarily an emergency?

* * *

57 MR. CHARLES J. HIMES

was called as a witness for the petitioner and having been duly sworn, was examined and testified as follows:

THE COURT: Please give your name and address to the reporter?

THE WITNESS: Charles J. Himes, 1011 Arlington Boulevard, Arlington, Virginia.

DIRECT EXAMINATION

Q. Mr. Himes, you are employed by City Service Oil Company?

A. Yes, sir.

Q. What is your job? A. Operations Supervisor.

Q. How long have you been continuously employed by City Service?

A. Seven years and six months.

THE COURT: He is Operations Supervisor of what territory?

58 THE WITNESS: Washington Division.

* * *

Q. Do you know all of the offices, establishments, warehouses and places of business that City Service Oil Company had in the years 1952 and '53 in and about the District of Columbia and its environs? A. Yes, sir.

* * *

Q. Did you have an office of any kind in the District of Columbia?

A. No, sir.

* * *

59 BY MR. COLIN:

Q. Did you hear Mr. Smith's testimony relating to telephone messages passed by his organization to your Company? A. Yes, sir.

Q. Who received those messages? A. I did.

* * *

60 BY MR. COLIN:

Q. You are familiar with the petitioner's system of receiving and accepting orders for furnishing of merchandise or service to its customers,

Mr. Himes? A. Yes, sir.

* * *

Q. What happens when an order comes in to City Service Oil Company?

* * *

61 THE WITNESS: Well, we wrote it down on an order pad.

THE COURT: I don't think it is helpful unless I know where the recipient of the order is and where it originates.

MR. COLIN: All right, we will assume an order might originate from anywhere outside of your office, let's say, including the District of Columbia or its environs?

THE COURT: Let's take the District of Columbia.

MR. COLIN: And assume that it comes in to you by telephone or in writing, what would happen at that point?

THE WITNESS: Well, we would check the customer's credit and despatch it out on the truck from Virginia.

BY MR. COLIN:

Q. Suppose after checking the customer's credit, you found that the customer was not entitled to credit, what would happen? A. Have to call your office in Baltimore to clear it. Unless it was cleared, the order would not be filled.

Q. What would happen if you did not have such a clearance? A. You wouldn't send it.

Q. When we talk about orders, would that also relate to those

63 that might have eventuated through the Telephone Answering Service of Mr. Smith? A. Yes, sir.

Q. And that would apply in the case of all orders, would it not, no matter how originated, is that so? A. Yes, sir.

* * *

64 BY MR. COLIN:

Q. Now, you used tank trucks and other trucks for the delivery of merchandise, did you not? A. Yes, sir.

Q. Where were those trucks stored, Mr. Himes? That is in the years in question, of course? A. 1421 Jefferson Davis Highway. We have a garage and warehouse there.

* * *

65 MR. EHRIG: Keep in mind all of these questions are for 1952 and 1953, unless I designate otherwise. Do you today have a salesman in the District of Columbia?

THE WITNESS: A salesman?

MR. EHRIG: Yes, with an office in the District of Columbia?

THE WITNESS: No, sir, our salesmen work out of Virginia. We have a TBA Agent.

BY MR. EHRIG:

Q. What is that? A. Tires, batteries and accessories. No, we don't, that thing wasn't signed. No, we have no agents in the District of Columbia.

66 Q. Explain more about TBA agent you were talking about. A. That man just handled our tires and batteries and so on. He distributed them.

Q. He distributed them for City Service?

THE COURT: When was that?

THE WITNESS: 1952 he did it, yes.

BY MR. EHRIG:

Q. Do you remember that man's name? A. E. C. Green.

Q. Where is his location, where is his office? A. It is actually one of our service stations, 4515 McArthur Boulevard, Northwest.

* * *

67 BY MR. EHRIG:

Q. Do you know the arrangement with Mr. Green? A. No, all I know he is one of our merchants. They are all called "merchants".

Q. What do you mean by "merchant"? A. Well, anyone that operates our station is a merchant, City Service Merchant.

68 Q. He is considered a City Service Merchant? A. Yes, sir.

Q. What did you say before, sir, as to Mr. Green's, I won't say

duties, but position as to these City Service products? A. I don't follow you.

Q. What does he do with these tires, batteries and accessories? A. He distributes them to our stations and so on.

Q. You said he was a TBA Agent, did you not. A. Now you are getting me all confused.

Q. Did you say it or didn't you? That was my recollection that you said he was a TBA Agent? A. Well, if I did, I meant he is a TBA distributor.

Q. Will you explain that? A. Well, he distributes the tires and batteries and so forth to our merchants.

Q. In other words, would you say that he is the central location for City Service products from which all other merchants are supplied? A. He could be classed that way.

* * *

69 MR. EHRIG: * * * What does Mr. Green do with the goods in his garage?

THE WITNESS: He sells them.

BY MR. EHRIG:

Q. To his merchants? A. Merchants buy their own. Mr. Green actually buys them from us and sells them.

Q. All right, do you have anything to do with that operation? A. No, sir.

Q. Who supplies Mr. Green with the goods? A. Our Baltimore office, our Baltimore warehouse.

* * *

70 Q. How long has he been over on MacArthur Boulevard? A. Well,
71 he has been there since I have been with the Company and I wouldn't know how long before that.

Q. That is seven years? A. Seven years.

* * *

BY MR. EHRIG:

Q. How many states does City Service sell oil in, distribute oil in and gas? A. All the states, I think. I don't know exactly.

Q. Virginia? A. Pardon?

Q. Is Virginia one of the states? A. Yes, sir.

72 Q. How many gas stations would you say you have in the State of Virginia? A. In the whole State of Virginia or just my territory?

Q. If you know, the whole State? A. I don't know the whole State.

Q. How many in your territory? A. About eight.

Q. Eight? A. That is in my immediate area.

Q. Are they all leased to independent operators? A. No, some of them are company operated.

Q. Company operates some of their own? A. Yes, sir.

Q. How about in the State of Maryland? A. In the State of Maryland, I believe we have about three Company operated or four.

THE COURT: Company operated?

THE WITNESS: That is our own employees operate them.

THE COURT: How about leases?

THE WITNESS: In Maryland?

MR. EHRIG: Yes?

THE WITNESS: I don't know.

BY MR. EHRIG:

Q. This is just your area, you don't know the whole State is that

73 correct? A. Yes.

Q. How about the District of Columbia, how many stations does City Service own in the District of Columbia?

THE COURT: You mean own the land and buildings?

MR. EHRIG: How many they own?

THE WITNESS: I don't know that.

BY MR. EHRIG:

Q. You don't know? A. Yes.

Q. Isn't this your territory? A. Yes, sir.

Q. You don't know how many stations there are? A. No, sir.

Q. Who does? A. Well, the real estate, I imagine.

THE COURT: You mean the Real Estate Department?

THE WITNESS: Yes, sir.

THE COURT: You know roughly speaking how many, don't you?

THE WITNESS: We have, roughly speaking, 52 in the entire Washington Division.

THE COURT: How about in the District of Columbia?

THE WITNESS: I imagine around 30.

74 BY. MR. EHRIG:

Q. Around 30? A. No, that is way high.

* * *

BY MR. EHRIG:

Q. Let me ask you this. you are the Operations Supervisor here. Don't you, so to speak, feed these gas stations in the District? A. No, sir.

Q. That isn't your job? A. No, sir. What do you mean feed them?

Q. Give them their gasoline every month they are going to sell when the tank goes dry and come in and fill them? A. That is the despatcher's job.

Q. Who is the despatcher in the Washington Division? A. Right now, we have no despatcher. There is a yard man takes care of it?

THE COURT: Well, in 1952?

THE WITNESS: I was the despatcher.

* * *

75 Q. Do you have a gas station at 5013 Georgia Avenue? A. No, sir, we have one on 5001 Georgia Avenue.

Q. Ever have one at 5013 Georgia Avenue? A. Not to my knowledge.

* * *

77 Q. You say you had a gas station at 5001 Georgia Avenue? A. 5001 Georgia Avenue.

Q. How long has City Service operated that station, to your knowledge? A. I don't know. They had it since I have been there.

Q. Over seven years? A. Yes, sir.

Q. Who is the operator of that station, sir? A. W. T. Newman.

Q. Now, sir, is Mr. Newman an employee of the City Service Oil Company? A. No, sir, he is a dealer.

Q. What do you mean by dealer? A. He operates the station.

Q. How many? A. They call them merchants now, used to be dealers. Now it is merchants.

Q. You wouldn't know why. Let me ask you this, sir, how many employees are at 5001 Georgia Avenue, if you know? A. I have no idea.

Q. What control does your office maintain over these merchants?

78 A. What control?

Q. I don't mean actual control. Let me rephrase that question. How does your office, this Washington Division or anyone in it keep in contact with these stations as to their supplies? A. We have salesmen.

Q. You have salesmen. What do the salesmen do? A. He calls upon his different locations and they tell him, you know, how much oil they want.

Q. How often do they call upon these stations? A. I believe they go out every week.

Q. Once a week? A. Yes, sir.

Q. What do you actually supply a gas station with? What would you supply to 5001? A. Gasoline and motor oil.

Q. What else? A. TBA.

Q. TBA, tires, batteries and accessories? A. Right.

Q. Who would supply that? A. That comes out of Fairfield. He gives it to the driver -- they used to have a truck come over every Thursday and bring this stuff over, this tires, batteries and accessories.

79 Q. I'm not positive I got where that tires, batteries and accessories came from? A. Fairfield.

Q. Where is that? A. Fairfield, Maryland. We have a plant there.

Q. What is this that comes from Mr. Green? A. Mr. Green buys it from us too and sells it.

Q. You told me before that Mr. Green distributed for City Service products in this area to the merchants? A. Well, if they need something, they might buy it from Mr. Green, if they don't happen to have it on hand.

Q. What is the distinction between Mr. Green and the goods coming from Fairfield then? A. Well, he keeps a bigger supply on hand than the --

Q. (Interposing) Am I correct in saying this, sir, they would check with Mr. Green first and if he didn't have it, then come from Fairfield? A. If he didn't have it, would they check with Mr. Green first for tires, batteries and accessories? No, they would check with their salesmen and salesmen would check with Fairfield or Mr. Green.

Q. The salesmen would go to 5001 and contact Mr. Newman? A. Right.

80 Q. Mr. Newman would say, "I need some tires, batteries and accessories." The salesmen would then go to Mr. Green and order those tires, batteries and accessories?

* * *

81 THE WITNESS: The salesman brings his order into the despatch office. The despatcher orders.

* * *

Q. What does the despatcher do? A. He calls the orders in.

Q. To whom? A. Fairfield, Green.

Q. Mr. Green also, in other words, either one, Fairfield or Green, is that right? A. That is right.

Q. You don't know which one they would get in touch with first?

82 A. No, sir.

Q. But, Mr. Green would be the most available man if he had the supplies on hand that were needed, isn't that correct? A. Right.

Q. What else do you spply now? You have mentioned oil and gas and tires and batteries and accessories. What else do you supply anyone in the District of Columbia with? A. That is all.

Q. No machinery? A. Machinery?

Q. Yes. A. No, sir. We install machinery.

Q. No lubsters, tire compressing machines, air compressors? A. We install that; yes, sir.

Q. Are they owned by City Service? A. If the property is owned by City Service, the equipment is owned.

* * *

83 MR. EHRIG: * * * Does City Service or any of its representatives,
84 Arlington or any place, come into the District and put maintenance crews on those or service them in any way?

THE WITNESS: Our maintenance crew works out of Arlington Ridge Road.

BY MR. EHRIG:

Q. Do they come to the District to service these machines? A. Yes, sir.

* * *

MR. EHRIG: Is that correct?

THE WITNESS: Yes, sir, that is what the maintenance crew is for.

BY MR. EHRIG:

Q. Maintenance crew is housed in Arlington? A. Yes, sir.

85 Q. How big a crew is that? A. They have three mechanics.

Q. One more question, sir, these pieces of machinery, air compressors, lubsters and the like are leased to gas stations, am I correct? A. That is right.

MR. WIXON: How many salesmen do you have other there, sir?

THE WITNESS: Four.

BY MR. WIXON:

Q. Now, you are speaking of the Division or unit which you personally employ? A. Four in the Division.

Q. Do you do any selling? A. No, sir.

Q. Anybody else do any selling beside the four salesmen, specifically so designated? A. No, sir.

Q. Where do they live, sir? Where do they have their homes? A. Well, let's see, there is one lives in Maryland and three of them in Virginia and one in the District.

Q. What is the name of the gentleman who lives in the District?

86 A. He is not a salesman. He is a merchandiser. He has not exactly been classed as a salesman.

Q. He is what, sir, a merchandiser? A. Merchandiser.

Q. What does he do? A. Puts up our pennants and displays, and so on.

Q. You mean advertising media? A. Yes, sir.

Q. In other words, do you have some sort of a program by which you augment your general advertising by special advertising such as pennants and displays and the like? A. Yes, sir.

Q. How often does that occur? A. Well, we advertise for grand openings at stations and when there is a sale or something.

Q. What does he do? A. He just puts up the banners and supervises it.

Q. At various stations? A. Yes.

Q. Various outlets? A. Yes.

Q Is that his full time employment? A Yes, sir.

Q. Who supervises him? A. I would say he didn't have a supervisor.

87 Q. His job then, from your standpoint, is independent of your operation, is that right? A. Yes, sir.

* * *

THE COURT: Does he have an office?

THE WITNESS: He is at our office, sir, Arlington Boulevard.

BY MR. WIXON:

Q. Does he report in every day? A. Not every day, no.

Q. He operates, as I take it, as he sees the necessity in that he reports or comes over to your office when the circumstances require and he is not under any direct compunction to be there at a certain time? A. The 88 salesmen sometimes come in once a week. Now, what they do, I have no control over and know nothing about.

Q. Salesmen don't have to report daily there? A. No, sir.

Q. They come over once a week? A. Sometimes they come in every day; sometimes they come in once a week.

Q. Is it left up to their determination as to when they will report?

* * *

A. I don't know how they designate if they don't want to come in. I have nothing to do with the salesmen.

Q. Well, we are not concerned with whether you have anything to do -- A. No, I don't know.

* * *

109 CROSS -EXAMINATION

BY MR. EHRIG:

Q. Mr. Pyke, did you state before that you prepared the returns for 1952 and 1953? A. Yes, sir.

Q. Did you fill in the D.C. address of City Service Oil Company? A. Yes, sir, I did.

Q. What was your reason in listing 5013 Georgia Avenue as your

110 D. C. address?

* * *

THE WITNESS: The records which I was using in preparing this showed a property which we owned in the District of Columbia under this address -- it was a service station.

BY MR. EHRIG:

Q. You owned other property also, didn't you? A. Yes, sir.

Q. What was your reason for selecting 5013 Georgia Avenue? A. I don't believe there was any particular reason other than the fact that it was one of the properties which we owned and because the form asked for a D. C. address, why, we chose one of the properties which we owned in order to show a D.C. address.

111 Q. Did City Service Oil Company, through you or any other officer, consider that to be your business address? A. I didn't. I can't answer for anyone else.

Q. Did you fill out the form? A. Yes, sir.

* * *

MR. EHRIG: Let's get the record straight. Do you have property or did you have property in 1952 and '53 at 5013 Georgia Avenue?

THE WITNESS: I'm not certain of that. The record which I was using for my information listed the address as 5013 Georgia Avenue. I have

information now which I believe indicates that is not the correct address. I'm not certain, I believe it is 5001.

BY MR. EHRIG:

Q. I believe 5001 Mr. Himes testified to. A. That is probably correct. That is the same property.

Q. Now, sir, let me ask you this, did you state that you also prepared the claims for refund for 1952 and '53? A. Yes, sir, I did.

* * *

112 Q. Did Mr. Cuthbertson read these documents before he signed them, do you know? Do you remember? A. I don't remember that.

Q. He has signed them, all of these documents I believe, has he not? A. Yes, sir, he has.

Q. Well, what is the practice, how do you, after you prepare them, what do you do with them? A. We present them to the officer that is to sign them.

Q. Mr. Cuthbertson? A. Mr. Cuthbertson in this case.

Q. Now, after you present them to him, just what does he do with them? For instance when you present to him, Petitioner's Exhibit No., well, 1 and 2, returns for 1952 and '53, what does he do with those when he 113 gets them, when you present them to him? A. Well, in this particular case, I can't remember exactly what he did do. The normal practice is for him to look them over, ask any questions that he might have concerning the

particular return and if he is satisfied with them, he signs them.

Q. He just doesn't sign them without reading them? A. No, sir, not normally.

Q. Now, as to Petitioner's Exhibit 3 and 4, claims for refund for 1952 and 1953, what is his practice with regard to those and presenting them to him? A. Would be the same.

Q. He reads them over? A. Read them over and ask questions, if he has any, and then signs them.

Q. Did he ever raise any questions about a D.C. address? A. I can't recall.

* * *

114 BY MR. EHRIG:

Q. I show you what has been marked Respondent's Exhibits A through F for identification, sir, and ask you if you can identify them? A. Yes, sir. (After inspection) They are applications for licenses, Motor Fuel Importer, District of Columbia for City Service Oil Company.

Q. Filed by City Service? A. Yes.

THE COURT: You are referring to Respondent's Exhibits A, B C and so forth?

THE WITNESS: Yes, sir.

115 THE COURT: All right.

BY MR. EHRIG:

Q. Those are for various years, is that correct? A. That is right, sir.

* * *

117 MR. EHRIG: Let's get back to the same question I asked you in regard to the return, Mr. Pyke, in answer to question 12 there, you list your resident and general agent in the District of Columbia as City Service Oil Company, 5013 Georgia Avenue.

MR. COLIN: Objected to.

MR. EHRIG: May I finish the question.

MR. COLIN: I'm sorry, I thought you were through.

THE COURT: Don't they speak for themselves.

MR. EHRIG: I want to know, what was the reason in lising it?

THE COURT: He said he didn't prepare it.

MR. EHRIG: His office did.

THE COURT: But he didn't prepare them.

MR. EHRIG: All right, do you know?

THE WITNESS: Not in connection with that.

* * *

121 Q. One other question in regard to your gas stations in the District
122 of Columbia, is it true that you rent many of your gas station properties rather than own them? A. Yes, sir, that is true.

Q. How many would you say you rent, just offhand? A. At the present time?

Q. Yes, in 1952 and '53? A. In 1952 and '53, I think there was about eight; I'm not certain of the number.

Q. Now, sir, isn't it true that in every case in which City Service rented a gas station property from another, that it subleased those stations for a lesser figure than its own rental figure? A. I can't answer that without looking at the figures.

* * *

123 BY MR. EHRIG:

Q. I show you, sir, a document with a list of your properties on it which you submitted to Mr. O'Connor by mail just recently. You recall that? A. Yes.

Q. Will you look at that? A. You see what threw me, you said in every case. I'm not certain.

Q. You look and see. A. I don't know if it is every case or not.

Q. In seven out of eight cases, is it not true that the figure for which you subleased these gas station properties was less than the figure which you were paying in rent?

* * *

124 BY MR. EHRIG:

Q. 2101 Georgia Avenue was one of your leased properties, was

it not? A. Yes, sir.

Q. Now, how much rent did you pay for that a year to the owner of the property? A. $8,400.

Q. How much did you sublease it for? A. $4,800.

* * *

125 Q. Isn't it true, sir, that you leased properties - without going into the sales of gasoline-but that you operate at a loss because of subleasing for less than the rental figure to you? A. That is one of the elements, yes. Generally that would be true; yes, sir.

Q. That is true? A. Yes, sir.

* * *

126 THE COURT: So there won't be any mistake about it or any question, 127 do you know, Mr. Witness, why they lease property for one figure that is lower than that which they pay the owner?

THE WITNESS: No, sir, I do not know. That is not my function.

* * *

129 Q. How long has City Service Oil Company been in business, do you know that? A. They were incorporated September 15, 1916.

Q. Have you been in business as an oil company ever since or in gasoline selling? A. As far as I know; yes, sir.

Q. How long have you been with them, sir? A. Almost 16 years, sir.

Q. Have they been in that type of business since your commencement with them? A. Yes, sir.

Q. How long have they been in business in the District of Columbia, their ownership of real property in the District of Columbia or leasing of real property in the District of Columbia? A. I traced back the figures
130 indicating that we purchased property in 1929 in the District of Columbia.

Q. How much did you purchase in 1929, do you know? A. How much?

Q. Yes, sir, what did you purchase? A. We purchased a group of service stations.

Q. How many? A. I don't know, sir, offhand.

Q. Just from your recollection? A. About six.

Q. Was the property at 5001 Georgia Avenue included among that group? A. I'm not certain, I don't remember.

Q. Thereafter, did you purchase any properties in the District of Columbia? A. I think there was one purchased in 1930.

Q. Where is that located, do you know? A. I don't know offhand.

Q. Subsequent to that, were any properties purchased in the District of Columbia by City Service Oil Company? A. Not to my knowledge.

Q. Were any leased? A. Yes, sir.

Q. When did your first leasing take place, if you know? A. To my
131 knowledge?

Q. Yes, sir. A. 1949.

Q. Have there been leasings subsequent to that? A. Not to my knowledge.

Q. You only leased one station? A. No, sir, a group.

Q. How many were in that group, sir? A. About eight, six or eight.

Q. That gives you a total of how many stations City Service Oil Company either owns or controls by leasing? A. About 14.

Q. Is 5001 property one of those leased? A. I believe so, I'm not certain of that either. We might own that one. I would have to look at my papers.

* * *

132 MR. WIXON: We don't want you to assume anything. Have you ever visited any of those stations in the District of Columbia?

THE WITNESS: No, sir.

* * *

138 REDIRECT EXAMINATION

BY MR. COLIN:

Q. I want to ask you one question. A. Yes, sir.

Q. Do you know the physical situation at number 5013 Georgia Avenue, Northwest, Washington, D.C.? A. No, sir, I do not.

THE COURT: You are not familiar?

THE WITNESS: No, sir.

* * *

139 SIDNEY L. PADDOCK

was recalled as a witness for the Petitioner and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLIN:

Q. Mr. Paddock, how long have you been employed by City Service Oil Company? A. Twenty-one years the 21st of next month.

Q. What has been the place of your employment for the company in that time? A. In that time?

Q. Yes. A. Boston, Syracuse, New York, Wilkes-Barre, Harrisburg, Washington.

Q. Confining yourself to this locality, how long have you been employed? A. Since 1945.

Q. What has been your work since 1945? A. Well, in 1945, I had charge of service stations in Washington and in '48 or '49, I went on commercial sales and since then on wholesale sales.

* * *

141 CROSS-EXAMINATION

BY MR. EHRIG:

* * *

Q. You stated in response to a question on direct examination that the office of City Service in this area was in Arlington? A. In Arlington.

Q. Was there an office in the District of Columbia? A. Not to my knowledge. City Service Company, but not City Service Oil Company.

Q. What is City Service Company? A. That is a holding company for City Service Oil Company.

Q. Where is that office? A. At that particular date, '52, Ring 142 Building, I believe.

Q. Where is it now? A. Ring Building, City Service Company.

Q. Still in the Ring Building? A. Ring Building.

Q. What was the precise name of that company? A. City Service Company.

Q. City Service Company? A. That is right.

Q. And what did you say it was, a holding company? A. I believe that is the way you classify it, owner or holding company.

Q. Is it the parent company? A. Parent company.

Q. Are there any officers of that company in the District? A. No, sir.

Q. What kind of an office do they have up in the Ring Building? A. It used to be an office for publication of a service magazine, I believe.

Q. What kind of a magazine is this? A. Company magazine that goes around.

Q. City Service Oil? A. No, City Service.

143 Q. City Service Company? A. That is right.

Q. Where does that magazine go? A. All over the United States, Canada, foreign countries.

Q. Do you have to subscribe to it, pay for it? A. No, sir.

Q. Who do they send it to? A. Customers, friends.

Q. Who are customers? A. People who buy from us.

* * *

144 Q. * * * To come back to the issue of what, if any office you had in the District in 1952 and '53, would you have had an office at 5001 or 5013

145 Georgia Avenue? A. No, sir.

Q. Are you sure? A. Sure.

Q. What makes you sure? What is up there? A. A service station.

Q. Where? A. 5001 Georgia Avenue.

Q. What is at 5013? A. I couldn't tell you. I believe right today it is a car dealer.

* * *

147 BY MR. WIXON:

Q. Mr. Paddock, you are, I believe, manager? A. Never.

Q. Salesman? A. Salesman.

Q. Did you sell? A. Yes, sir.

Q. Did you sell in the District of Columbia? A. Solicit.

Q. That is selling, you solicited sales? A. I solicited, that is right.

Q. Who did you solicit? A. Commercial accounts.

148 Q. Commercial accounts? A. That is right.

Q. Who would the commercial accounts be? A. Super Concrete, Capital Transit Company, people of that type.

Q. For what purpose? A. To sell them gasoline and oil, if I could sell them, when somebody else is supplying them.

* * *

151 MR. WIXON: How often do you come into the District of Columbia, sir?

THE WITNESS: Oh, maybe once or twice a week.

* * *

Q. Do you have an office?

152 A. With the other salesmen in the same building in Arlington.

* * *

Q. Is there any manager there? A. Yes, sir.

Q. Does he come into the District of Columbia? A. I assume he does.

Q. How many customers do you solicit in the District? A. Oh, that is a broad question. I can consider every commercial piece of business -- that is what I am hired to do.

Q. What do you try to sell them? A. Gasoline, motor oils, number two fuel oil, black oil, kerosene.

Q. Anything else? A. No.

Q. Just oil and gas? A. That is my job.

* * *

153 Q. Does your company sell those products, tires and batteries?

* * *

A. I'm trying to think how to answer you. We sell tires to a distributor and he in turn sells the tires to the dealers. Is that what you want to know?

Q. I just want to know the facts, sir. Who is the distributor?

A. Mr. Green.

Q. Who is Mr. Green? A. Mr. Earnest Green, dealer on MacArthur Boulevard.

Q. On MacArthur Boulevard? A. MacArthur Boulevard.

Q. Is he under contract with City Service? A. That is something I can't tell you.

154 Q. Do you ever have any contact with him? A. Do I ever?

Q. Yes. A. I saw him last night.

Q. In what capacity? A. At a meeting we had here last night at the Hotel Hamilton.

Q. Who is "we"? A. The company.

Q. Who was there for the company? A. Who was there for the company?

Q. Yes. A. The dealers, merchants.

Q. Who were the dealers and merchants? A. Who are they?

Q. Yes, sir. A. Sell and operate our service stations.

Q. Now the Company's dealers and representatives had a meeting, I understand from what you said, last night? A. That is right.

Q. Where was the meeting held? A. Hotel Hamilton.

Q. How many people were there? A. I don't know, I didn't count them.

Q. Let's see if we can get an estimate? A. Thirty-five or fourty.

155 Q. Anybody who was not connected with the company there? A. Yes.

Q. In what capacity were they? A. Mr. Lewis Allen, I don't know what capacity you would call him in -- carrying on a TV program.

Q. What was the meeting about? A. Advertising.

Q. What kind of advertising was the conversation about? A. I didn't hear you?

Q. What kind of advertising were you discussing? A. TV program,

radio programs, newspaper, any media of advertising.

Q. Why were these City Service Oil Company operators and representatives there? A. What was their purpose in being at this meeting? To tell them of our advertising program.

Q. Are they going to advertise in the District of Columbia? A. Through the medium of TV and radio and newspapers, yes.

Q. How is that carried on? What is the gist of determination as to how that would be carried on? A. I don't understand the question.

156 Q. Are they going to advertise City Service Oil Stations? A. No, the product.

Q. That sold the product?

THE COURT: He said they are going to advertise the product.

THE WITNESS: That is right.

MR. WIXON: Was there going to be any reference to any City Service Oil stations or dealers or anything?

THE WITNESS: No, just the product.

* * *

157 Q. About how many were there that sold City Service products in the District of Columbia? A. I couldn't tell you.

Q. Any of them whom you knew? A. Sure, some of them. I stop in to buy gasoline, I should know them.

Q. How many of them that you knew were there? A. I could not tell you, I didn't count them.

Q. Was there more than one? A. I would say there was more than one.

Q. Was there more than two? A. More than two.

Q. Now, how many would you say, to the best of your recollection, were there? A. Maybe six.

Q. Bey your pardon? A. Maybe six.

* * *

162 RALPH A. CUTHBERTSON

was called as a witness for the Respondent and having been duly sworn, was examined and testified as follows:

THE COURT: Would you mind giving your full name and residence to the reporter?

THE WITNESS: Ralph A. Cuthbertson, 26 Spencer Drive, Short Hills, New Jersey.

DIRECT EXAMINATION

BY MR. EHRIG:

Q. Mr. Cuthbertson in 1952 and 1953, were you Secretary of City Service Oil Company? A. Yes.

Q. In your capacity as Secretary, sir, do you sign tax returns for City Service Oil Company in the District of Columbia? A. I signed all tax

returns that require the Secretary's signature.

* * *

163 BY MR. EHRIG:

Q. I hand you Respondent's Exhibit H for identification and ask you if you can identify it? A. I'm not clear on what you mean by identifying it? It is franchise tax. [sic]

Q. First of all, does your signature appear on it? A. That is my signature on it.

Q. What does it purport to be? A. Franchise return for the District of Columbia.

Q. For the year? A. For the year 1950.

THE COURT: 1950?

MR. EHRIG: 1950.

164 BY MR. EHRIG:

Q. Would you examine Respondent's Exhibit I for identification and see if you can identify that document? A. (After inspection) I signed this document. It is the same type of return for the District of Columbia, for the year '51.

Q. 1951? A. Right.

Q. Would you examine Respondent's Exhibit J for identification and state whether or not you can identify it? A. I recognize it as the same type of year for the year '54 which I signed.

* * *

166 THE COURT: Mr. Ehrig, what is the purpose?

MR. EHRIG: I'm going to show throughout the years, City Service has been in business in the District. They have stated that they have maintained an office at 5013 Georgia Avenue.

THE COURT: That is all on the returns. They never said they maintained an office.

MR. EHRIG: If your Honor please, I think the records show it.

THE COURT: Maintained an office, where?

MR. EHRIG: 5013 Georgia Avenue.

THE COURT: Where is any office?

MR. EHRIG: D.C. address.

THE COURT: That is different. This has D.C. address, the very two years, they have the same thing.

MR. EHRIG: That is what I want, I want to show, your Honor, I will state the only purpose I'm showing these in evidence is to show --

THE COURT: You are duplicating -- even the ones in evidence show D.C. address, 5013 Georgia Avenue.

MR. EHRIG: I want to show your Honor further that through all of the years, they have maintained the same address.

167 THE COURT: I'm going to grant the motion to strike the papers, gentlemen, it has nothing to do with the case. It is duplication. It is

already in the testimony for the years involved, that the D.C. address was 5013 Georgia Avenue.

* * *

BY MR. EHRIG:

Q. Mr. Cuthbertson, would you examine Respondent's Exhibits, A, B, C, D, E and F for identification and tell me whether you can identify them?

* * *

168 THE WITNESS: They are types of documents that are normally prepared by our Tax Department and I have seen many of them.

* * *

Q. What are they? A. Applications for licenses for Motor Fuel Importers, District of Columbia.

* * *

170 THE COURT: I am going to admit Respondent's Exhibit D, which is for the year 1952, which contains the following question and answer:

"12. A foreign corporation, name and address of resident general agent in District of Columbia?"

Answer: "City Service Oil Company, 5013 Georgia Avenue, Washington, D.C."

Let the record show that such question and answer appeared in applications for license for motor fuel importer in the District of Columbia

for the years 1950, '51, '54 and '55.

MR. EHRIG: All right.

THE COURT: I am interested in keeping the record down, Mr. Ehrig.

172 BY MR. EHRIG:

Q. I hand you Respondent's Exhibit D and ask you if the statements contained thereon are true or false? A. I leave that up to the judgment of the tax people.

Q. No, I'm asking you the answer to factual questions.

THE COURT: Mr. Cuthbertson, he is asking from your own knowledge, and of course, you can only testify to your own knowledge, he wants to know whether those answers are true or false as far as you know?

MR. COLIN: Your Honor, may we have the witness' attention directed to a particular answer rather than to the entire page? I think that would be more pointed.

THE COURT: I don't think that is necessary.

MR. EHRIG: Ask for the entire document, first?

173 THE COURT: You can call his attention, if you want to, in cross-examination to any question.

THE WITNESS: I observe that this is the City Service Oil Company report, their address is correct, the name and titles of the officers and

directors as shown are correct. There is nothing on there that I observe that is incorrect, to the best of my knowledge.

BY MR. EHRIG:

Q. Those statements are all true? A. I believe so.

Q. In the year 1952, were they correct? A. I don't know when it was filed. Does it show? Yes, 1952. It should have been true then.

Q. Would those statements have continued to be true for the year 1953? A. I don't know what changes might have been made in the year '52 or '53.

Q. In regard to '53, sir, did you say you knew of no change? A. I can't remember that there would be any change.

* * *

MR. EHRIG: I'm sorry. Do you examine these carefully when you sign them and submit them?

174 THE WITNESS: Not ordinarily. It looks to me like a routine type report that we have in many locations.

BY MR. EHRIG:

Q. You have to swear to it, don't you? A. I swear to it but I sign them and the Tax Department keeps me from doing something that I shouldn't.

Q. Now, sir, for the continuing years after this application in 1952, were any material changes made? A. We have occasional change

of officers and directors.

Q. Other than the officers and directors in this? A. No change that I can remember.

Q. Up to the present time? A. We changed our type of operation and our physical area of divisions several times. I don't remember when they were changed.

* * *

181 REDIRECT EXAMINATION

BY MR. WIXON:

Q. Mr. Cuthbertson, why did you sign that application for motor vehicle fuel importer's license for the District of Columbia? A. Because it was given to me to sign by responsible people.

182 Q. Did you know what it was being used for? A. I know what the form implies and it is used for that purpose in many locations.

Q. There are other locations which require motor vehicle fuel importer's license, isn't that true? A. I believe so, sir.

Q. Don't you have occasions, from time to time, to see documents of that type passing over your desk, sir? A. I see them when they are offered to me to sign, but I do not examine them carefully.

Q. Is it part of your necessary operations in your office with City Service Oil Company that you know what requirements there are for the various states and jurisdictions having police powers with respect to the

importation of motor vehicle fuels? A. I do not personally concern myself with that. We have a Tax Department that takes care of it for me.

Q. So far as you are concerned, sir, such an item which came to you, you would sign as an officer because it was required that the signature be on there, is that right, sir? A. Right.

183 Q. Now, you are familiar with the fact that the District of Columbia does require this license, I believe you so stated? A. I am only sure that I signed it. I didn't think about whether the District required it or not.

Q. Did you see the heading on it, sir, when you signed it? A. Not consciously.

Q. I think you testified a short time ago that you observed the nature of the document at the time you signed it. You did say that, sir? A. Yes.

* * *

184 BY MR. WIXON:

Q. You did, I believe say, when you signed this, you observed that heading on Respondent's Exhibit D, it was stated to be an application for license as motor fuel importer, District of Columbia? A. Right.

Q. You knew the nature of it then when you signed it, isn't that true, sir? A. Right.

Q. Now, you knew it was being signed and being filed for some purpose, did you not, sir? A. Yes.

Q. And didn't you know, sir, when you signed it, that it was going

to be used in order that a license could be issued to City Service Oil Company
185 to operate as a motor fuel importer in the District of Columbia?
A. I didn't think of that consciously.

Q. But you knew it, did you not, sir? A. I knew it instinctively.

Q. Now, would you have signed that if you had known that the statements or any of them contained therein were false? A. No, not if I had known, I wouldn't have.

Q. So far as you were concerned then at the time you signed this, they were in fact true, is that right, sir? A. I would say that to the best of my knowledge, they were true statements.

* * *

190 Q. Would that be a usual occurrence to lease a station, let us say, to a dealer who was going to sell Esso properties? A. No.

Q. Then would it be correct to say when a station is leased by City Service Oil Company to a filling station operator that that operator will sell City Service Oil products? A. Right.

* * *

197 THE COURT: I want to ask you a few questions. Are you generally familiar with the situation of the City Service Oil Company itself?
198 THE WITNESS: In general, yes, sir.

THE COURT: It is the sole stockholder of the City Service Oil, is it?

THE WITNESS: That is right, sir.

THE COURT: Is it sole stockholder of any other corporations?

THE WITNESS: Yes, sir.

THE COURT: Would you give me some of them?

THE WITNESS: City Service Company is the parent company of the City Service Oil Company of Pennsylvania, and to the best of my knowledge, City Service Oil Company of Delaware, the City Service Oil Company Limited of Canada, the Swift Lite Corporation. Ships Incorporated, --

* * *

THE COURT: Now, how do you get your oil, I mean, what is the arrangement between your company and the City Service Company?

THE WITNESS: We do not deal in the purchase of our petroleum products, we do not deal with City Service Company. We deal with the City Service Refining Corporation at Lake Charles, Louisiana, which is our principal supplier of refined oil products.

199 THE COURT: Now is that owned by City?

THE WITNESS: That is right. I forgot to mention that is one, I mean one-hundred percent owned by City Service Company. They have a large refinery and we buy, by using our own tankers we transport it up to our East Coast locations and pay them for the material and resell it.

THE COURT: Now do you sell it [gas and oil] to distributors?

THE WITNESS: We sell it to distributors; we sell it to dealers --

THE COURT: (Interposing) I mean, with respect to these gasoline stations which you lease and those which you own, what is the transaction?

THE WITNESS: The material comes up, we will say, to our big terminal at Norfolk, Virginia, and it will be transported over here in some manner and resold to dealers that are operating the stations in the District of Columbia.

THE COURT: Do they pay you?

THE WITNESS: The dealer will pay us, or it might be a dealer of a distributor, like Mr. Freedman, as an example. Then, of course, we would sell to the distributor and he, in turn, would sell to the dealer, and that would appear to be City Service stations, selling City Service products, but they might buy that from a distributor or from City Service Oil Company.

* * *

200 MR. COLIN: Just for your Honor's clarification, is City Service Company an operating or non-operating company, Mr. Cuthbertson?

THE WITNESS: Non-operating company.

* * *

JOHN C. AHEARN

was called as a witness for the respondent and, having been duly sworn, was examined and testified as follows:

THE COURT: State your name.

THE WITNESS: John C. Ahearn

201 DIRECT EXAMINATION

BY MR. EHRIG:

Q. What is your position? A. Assistant Assessor, District of Columbia.

Q. Are you also a member of the Board of Personal Tax Appraisers? A. That is correct.

Q. I will show you, Mr. Ahearn, Respondent's Exhibit [D] and ask you if you recognize that application form? A. (After inspection) I do.

Q. What is your job with that form every year? A. These forms are filed with us each year and we issue the license after examining it, issue a license to operate the ensuing year.

Q. I want to ask you one question, Mr. Ahearn, with regard to question number twelve on that formwhich you have referred to, a hypothetical question; if that question were not answered, just left blank on the application form, what would be the disposition with regard to the application.

THE COURT: Do not answer.

MR. COLIN: Objected to, your Honor.

THE COURT: I will sustain the objection. He should have been denied. He should have sent it back and said "Answer the question." He

did not answer the question. First it is a hypothetical question; second, how does he know what would have happened.

* * *

BY MR. EHRIG:

Q. Just one question, Mr. Ahearn, and you can wait before you answer for the objection. Based upon this application, Respondent's Exhibit D, would the Board of Personal Tax Appraisers have issued a permit for an import license to sell gasoline, to import gasoline into the District of Columbia to City Service Oil Company, if it had known that they did not, in fact, have a resident general agent in the District of Columbia?

MR. COLIN: Objection.

THE COURT: I will sustain. They must have known.

* * *

212 RAY H. HAMILTON

was called as a witness for the respondent and, having been duly sworn, was examined and testified as follows:

THE COURT: Give your name and address to the reporter.

Washington, D.C.

DIRECT EXAMINATION

BY MR. WIXON:

213 Q. Can you tell from your records whether a license was issued to City Service Oil Company for years for which the respondent's exhibits 214 K and L apply? A. Yes, I can tell from the applications that license was issued.

Q. And how do you so tell, sir? A. Because the number of the license is stamped on the application, and I know from experience that each license has a number and we number these applications when we issue the license.

THE COURT: All right, the witness is testifying from Exhibits K and L. All right, have you any objection to that?

MR. COLIN: No, sir.

* * *

218 WILLIAM R. BUDD

was called as a witness for the Petitioner, and having been duly sworn, was examined and testified as follows:

THE COURT: Would you give your full name and address to the reporter?

THE WITNESS: William R. Budd, 2906 Rising Sun Road, Ardmore, Pennsylvania.

DIRECT EXAMINATION

BY MR. COLIN:

Q. Mr. Budd, you are employed by Cities Service Oil Company? A. Yes, sir.

Q. Were you employed by Cities Service Oil Company in 1952 and 1953? A. Yes, sir.

Q. In what capacity, sir? A. Supervisor in accounting, in charge of rentals.

Q. And which office or unit of Cities Service Oil Company? A. The Philadelphia region.

219 Q. Did that region have within its charge at that time the properties of the company in the District of Columbia? A. Yes, sir.

Q. Dealing now particularly with income from rentals in the District of Columbia, in 1952 and 1953, what was your function, Mr. Budd? A. To record rents receivable, render billing therefor.

* * *

235 BY MR. EHRIG:

Q. As far as the gas stations are concerned, Mr. Budd, when you lease a gas station to an independent operator, one of these merchants, what goes with the station? A. The full operation.

Q. Are the tanks usually in, the gas tanks? A. Tanks, pumps.

236 Q. What else? Lubricating machines? A. Yes.

Q. Does the rental include all those items? A. That is right.

* * *

Q. This account, Ash Smith, that is a gas station, is it, sir? A. Right.

* * *

237 Q. That is $40 per month, is that correct, sir? A. That is one dollar.

Q. It started at $40, is that correct? A. Yes and was abated to $1.00.

Q. Can you say, from your knowledge of these records, why that was abated to $1.00? A. No, I don't recall particularly.

Q. In other words, staring with March 1953, Ash Smith -- A. (Interposing) February.

Q. February, 1953 (Continuing) -- Ash Smith paid $1.00 a month rent? A. That is right.

* * *

238 Q. I notice that this 3101 Rhode Island Avenue, is that a gas station? A. Yes.

Q. And that was abated to $1.00 a month? A. Yes.

* * *

239 Q. And the total for 1952 was $9.00, is that correct? A. That is right.

Q. Would you know, sir, is there something wrong with those properties that they only bring $1.00 a month? A. I don't know.

Q. Is there any practice of the company that you know of that would cause them to be abated to $1.00 a month? A. No, I don't know.

Q. Would you know, sir, as to each of these properties involved, or any of them, how much rent Cities Service paid for them? A. No.

Q. Do you have any records which would show that? A. Oh, yes.

Q. Do you have them here? A. No.

Q. Do you have any recollection as to any individual properties, the rent you pay for them as opposed to the rent you charge? A. I do not.

* * *

241 WILLIAM R. BUDD

was recalled as a witness on behalf of the Respondent, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EHRIG:

Q. Mr. Budd, you are in the accounting department, concerned with rental income, is that right? A. That is right.

242 Q. Does that rental income take in all properties rented by Cities Service? A. In the Philadelphia region.

Q. Which includes the District of Columbia? A. That is right.

* * *

Q. Would you be familiar then, sir, with the property which we referred to before the lubsters and compressing machines and various other items that Cities Service leases to various people, and the rent that they receive from that service?

* * *

243 THE COURT: What is a lubster?

MR. EHRIG: For lubricating automobiles and trucks, any of these commercial firms with a fleet of trucks get their own and keep them in their yards, rent them from the oil companies, serviced by oil companies.

THE COURT: Does he know anything about that?

THE WITNESS: I can answer that question. They are not leased out. They are loaned out.

BY MR. EHRIG:

Q. Loaned? A. That is right.

Q. Is there a charge for them? A. No.

Q. You don't charge anybody for the use of these machines? A. No.

THE COURT: Now let's say that Woodward and Lothrop has a garage and they want to use the compressing machines and you let them have them for nothing.

THE WITNESS: That is right.

THE COURT: That is different from the machinery or equipment

in the gasoline stations?

244 THE WITNESS: That is right.

THE COURT: Then this is to commercial establishments?

THE WITNESS: Not on our property.

* * *

245 Q. Is this loan on a permanent basis? Do Embassy Dairy and these places keep the lubsters on their property permanently? A. You mean for time immortal?

Q. Let me say this: For a period of years. A. It is possible.

Q. Cities Service purchases these machines themselves? A. Cities Service owns them.

Q. They have purchased them and they own them, right? A. Right.

* * *

251 JOHN C. AHEARN

was recalled as a witness on behalf of the Respondent, and was again duly sworn, and testified further as follows:

* * *

DIRECT EXAMINATION

BY MR. EHRIG:

Q. Mr. Ahearn, I show you Respondent's exhibit D -- I took this 252 from your file, your Honor -- application for Motor Vehicle Fuel Importer's License filed by Cities Service, and ask you this, Mr. Ahearn:

What is the procedure followed by your office, or yourself, at the very beginning of the year, when it comes time for the processing or the filing of these applications? What do you do?

* * *

A. About a month and a half prior to the date of the expiration of the current year's license, we send out blank forms, blank applications for license forms, to each importer, and request that they be filed by a certain date.

BY MR. EHRIG:

Q. And does this Respondent's exhibit D -- is this such a form?

A. That is correct.

Q. Now sir, tell us what happens when you get them back.

* * *

253 A. We review the application, see that it is properly filled in and sworn to, before we issue the license.

* * *

THE COURT: * * *

260 Let me say this: I make a practice in this Court, I don't care when it is, up to the point that I make a decision, any side can come in and have additional testimony. All they have to do is let me know or let the Clerk know. It is not a game and what I am trying to do is get all the facts. Now nobody can be hurt -- I mean really hurt, legally hurt -- by getting all the facts. Now here they introduced the paper in evidence, and they introduced

the bond in evidence. I don't think it threw any light on it, very much, but I thought it ought to go in. Now they want to know what reaction somebody in the Assessor's office had when they read this answer to question 12. That is what he is trying to get. But he didn't have that in the first case. Now I don't think it is material. And you, Mr. Colin, have objected to it. I am going to sustain the objection. I don't think it makes any difference what somebody may have believed in the Assessor's office. I think that
261 what I have to go on is what a person, an ordinary person, would have thought, an intelligent person, when they read that. This is all I have to go on, Mr. Ehrig.

I still think that the main thing we have to prove -- it doesn't throw any light on whether or not these people had an office or an agent with an office in the District of Columbia.

* * *

MR. EHRIG: Your Honor, may I make a proffer of Mr. Ahearn's testimony?

THE COURT: Yes. What do you expect to prove by it? Someone said he would rather have a proffer than testimony in cases.

* * *

MR. EHRIG: I wish to proffer, your Honor, that if Mr. Ahearn were asked the question if question number 12 were left blank, what action he would have taken upon that application, that Mr. Ahearn's answer would

262 be that he would have returned the application and denied the license; that if he were asked the question if he had known as a fact that question number 12 was incorrect or false, that he would also have denied the application for an importer's license; that if Mr. Ahearn were asked the question what construction he placed upon the answer to question number 12 in Respondent's exhibit D, Mr. Ahearn would simply have stated that he was familiar with the gas station on Georgia Avenue, he was familiar with the gas station itself, and had been for some time, and he knew the gas station was there, and that he presumed that Cities Service Oil Company had an agent there that they were designating and did not question it; and that is my proffer, your Honor.

THE COURT: All right. I will sustain the objection to the question.

267 FILED JUL 15 1957 DISTRICT OF COLUMBIA TAX COURT

FINDINGS OF FACT AND OPINION

The petitioning taxpayer paid franchise taxes for the calendar years 1952 and 1953. It subsequently filed claims for refund of the tax. The claims for refund were denied by the Assessor. The petitioner here appeals from such action on the grounds (a) that it was not liable for any franchise tax because, it contends, neither it nor any officer, agent, or representative had an office or place of business in the District of Columbia and that, therefore, it did not engage in any trade or business in the District; and (b) in the alternative, if it or its representatives should be held to have had an office or place of business in the District, that the tax paid by it exceeded its legal liability. The respondent denies the validity of both contentions.

Findings of Fact

1. The petitioner is a Pennsylvania corporation with its principal office at 60 Wall Street, New York 5, New York.

2. The petitioner is engaged in the wholesale selling of gasoline, oil and other petroleum products, and automobile tires, batteries and accessories; and in connection with such business it leases or subleases to

268 distributors or merchants of gasoline, oil and other of its products a number of gasoline stations which it either owns or leases, as the case may be.

3(a) During the taxable years involved herein the petitioner sold petroleum products, tires, batteries and accessories to operators of gasoline stations, or "merchants" as they are called by the employees of the petitioner. Such products and merchandise were sold by salesmen or solicitors employed and paid by the petitioner. The petroleum products were delivered to the gasoline stations in trucks owned by the petitioner and driven by its employees. The trucks were loaded in nearby Virginia where the petitioner maintained a supply of petroleum products, where the trucks were stored and where there was a garage and warehouse owned and operated by the petitioner.

(b) The tires, batteries and accessories were sold to the merchants by salesmen and were obtained from a plant of petitioner in Maryland or from E. C. Green of 4515 McArthur Boulevard, Washington, D.C., who had theretofore purchased the merchandise from the petitioner, and acted as sort of a wholesaler in supplying the operators of gasoline stations. He was not employed by the petitioner.

(c) The gasoline stations to which the petroleum products and merchandise were delivered were either owned or leased by the petitioner, and were in turn rented to, or subleased to the gasoline station operators or merchants by the petitioner. In respect to one station, at least, it was subleased to the operator or merchant at a rental lower than the rental paid by the petitioner as lessee.

(d) A quantity of petroleum products was sold to commercial

establishments by salesmen of the petitioner.

4(a) The sale of petroleum products to gasoline station operators and to commercial establishments was effected by the solicitation and obtaining of orders by salesmen, the forwarding of such orders to the office
269 of petitioner in Virginia, the acceptance of the order there and the delivery of the products in the trucks of the petitioner loaded at the storage facilities of the petitioner in Virginia. Some orders were telephoned into the Virginia office.

(b) The sale of petroleum products and merchandise in the Washington Metropolitan area, including the District, was effected by four salesmen or solicitors of the petitioner, one of whom lived in Maryland, two in Virginia and one in the District of Columbia. None had an office, warehouse or place of business in the District; and all of whom had their office in Virginia.

5(a) During the taxable years involved the petitioner had two offices or places of business in Virginia, one at 1421 Jefferson Davis Highway and one at 1753 North Arlington Ridge Road, both in Arlington. It had no office, warehouse or place of business in the District of Columbia.

(b) In respect of the calendar years 1952 and 1953 the petitioner made application for a license as a motor fuel importer to import motor fuel into the District of Columbia, filed a surety, and obtained a license to import motor fuel under an Act of Congress entitled "an Act to provide for a

tax on motor fuels sold within the District of Columbia, and for other purposes", approved April 23, 1924, as amended.

(c) The applications for license to import motor fuel for the calendar years 1952 and 1953 signed by the petitioner were in the form of questionnaires. Question 12 therein was in the language following: "If a foreign corporation, name and address of resident general agent in the District of Columbia". The answer or response of the petitioner in both applications was the following: "Cities Service Oil Company, 5013 Georgia Avenue, Washington, D.C."

(d) The petitioner had no office, place of business or warehouse, nor any facility, nor owned, leased or operated any gasoline station at nor had any connection with premises No. 5013 Georgia Avenue, Washington,
270 D. C.

6(a) The petitioner filed with the Assessor a "Corporation Franchise Tax Return" for the calendar year 1952, computed its franchise tax liability to the District of Columbia to be in the amount of $5,145.24, and on August 17, 1953 paid that tax, together with interest in the amount of $106.57, or a total of $5,251.81.

(b) On January 3, 1956, the petitioner filed with the Assessor a claim for refund of the aforesaid franchise tax and interest. Such claim for refund was denied by the Assessor on October 4, 1956.

(c) In its franchise tax return for the calendar year 1952 the petitioner computed its tax liability as follows:

GROSS INCOME	Within and without the District	Within the District
Gross sales (inventories)	$240,270,781.12	
Less: Cost of goods sold	213,811,111.09	
Gross profit from sales	26,459,670.03	$ 95,069.59
Gross profit (no inventories)	18,070,692.71	64,928.00
Interest on loans, etc.	230,709.18	
Rents	1,263,403.44	58,335.18
Gain from sale or exchange	24,426.99	
Dividends	1,500.00	
Other income	1,075,523.93	
Total Income	$ 47,077,072.30	$218,332.77
DEDUCTIONS		
Compensation of officers	$ 170,800.00	
Salaries and Wages	7,859,853.25	
Rent	3,558,984.60	
Repairs	7,538,467.83	
Bad Debts	28,860.09	
Interest	776,736.16	
Taxes	1,682,964.39	
Contributions	7,388.25	
Depreciation	3,423,907.31	
Depletion of mines, oil and gas wells	230,386.85	
Advertising	1,400,275.00	
Pension, annuity, stock bonus, etc.	845,510.47	
Other deductions authorized by law.	4,601,679.14	
Total Deductions	$ 32,125,813.36	$115,428.05
NET FRANCHISE TAX COMPUTATION		
Net taxable income	$ 14,951,258.94	$102,904.72
Amount of tax (5%)		$ 5,145.24

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COMPUTATION OF DISTRICT OF COLUMBIA APPORTIONMENT FACTOR

A. Total net sales within and without the District of Columbia.	$271,461,366.29
B. Total net sales within the District of Columbia.	975,351.22
C. District of Columbia apportionment factor.	.003593

(d) The item of rent income in the amount of $58,335.18 was allocated, as distinguished from apportioned, to the District of Columbia. All other items, including depreciation, were apportioned to the District of Columbia on the basis of the apportionment factor of .003593.

7(a) The petitioner filed with the Assessor a "Corporation Franchise Tax Return" for the calendar year 1953, computed its franchise tax liability to the District of Columbia to be in the amount of $2,882.01, and on August 16, 1954, paid that tax, together with interest in the amount of $57.64, or a total of $2,939.65.

(b) On January 3, 1956, the petitioner filed with the Assessor a claim for refund of the aforesaid franchise tax and interest. Such claim for refund was denied by the Assessor on October 4, 1956.

(c) In its franchise tax return for the calendar year 1953 the petitioner computed its tax liability as follows:

GROSS INCOME	Within and without the District	Within the District
Gross sales (inventories)	$248,779,794.37	
Less: Cost of goods sold	233,799,514.47	
Gross profit from sales	14,980,279.90	$ 71,935.30
Gross profit (no inventories)	10,168,378.08	48,828.55
Interest on loans, etc.	249,777.33	
Rents	1,446,225.28	40,447.09
Royalties	4,377.66	
Gain from sale or exchange	98,286.36	
Dividends	600.00	
Other income	77,104.34	
Total Income	$ 26,828,456.23	$161,210.94
DEDUCTIONS		
(Only total deductions given without any detail)	$ 21,568,234.52	$103,570.66
NET FRANCHISE TAX COMPUTATION		
Net taxable income	$ 5,260,221.71	$ 57,640.28
Amount of tax (5%)		$ 2,882.01

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COMPUTATION OF DISTRICT OF COLUMBIA APPORTIONMENT FACTOR

A. Total net sales within and without the District of Columbia.	$271,607,955.61
B. Total net sales within the District of Columbia.	1,304,182.38
C. District of Columbia apportionment factor.	.004802

(d) The item of rent income in the amount of $40,447.09 was allocated, as distinguished from apportioned, to the District of Columbia. All other items, including depreciation, were apportioned, to the District of Columbia on the basis of the apportionment factor of .004802.

8(a) No evidence was introduced as to the amount of rent received by the petitioner during the two taxable years involved from the operators of the gasoline stations leased or subleased to them.

(b) Evidence of a general nature and not in detail was introduced showing the expenses relating to the leased and subleased properties to be as follows:

Items	1952	1953
Rent expense	$56,234.06	$30,205.77
Real Estate Taxes	4,855.54	4,784.59
Depreciation	14,890.79	16,173.17

(c) The record does not disclose the age, character or cost of the buildings or structure, in relation to which the deduction for depreciation is claimed. Testimony indicates that the percentage in excess of five per centum was used in computing the amount of deduction for depreciation.

9. This proceeding was filed January 2, 1957.

Opinion

The petitioning taxpayer filed franchise tax returns under the District of Columbia Income and Franchise Tax Act of 1947, for the calendar 1952 273 and 1953, computed its tax liability thereon, and voluntarily paid the computed franchise taxes together with interest.[1] Thereafter the petitioner determined that it was in error in paying the taxes and that it was not liable

(1) Interest was due because the Assessor, at the request of the petitioner, granted an extension of time for the filing of returns and the payment of tax.

to franchise taxation in the District of Columbia. It thereupon and within the statutory period filed claims for refund of the taxes for the two years involved on the grounds (a) that under the provisions of Section 47-1551c(h) of the District of Columbia Code, 1951 Edition, it was not engaged in any trade or business in the District of Columbia since it did not physically have or maintain an office, warehouse, or other place of business in the District, and did not have any officer, agent or representative having an office or other place of business in the District during the taxable years; and (b) in the alternative, that its computation of the tax liability on the returns was excessive in that it failed to deduct certain expenses relating to real property which it owned or rented.

The Assessor denied the claims for refund. From such action the petitioner appeals to this Court on substantially the same grounds as set forth in the claims for refund.

The petitioner is a Pennsylvania corporation with its principal office in New York City. It is engaged in the sale at wholesale of gasoline, oil and related petroleum products, and automobile tires, batteries and accessories. In carrying on, and to promote such business the petitioner leased or subleased to merchants or dealers gasoline stations in the District of Columbia which it either owned or had rented from the owners. They numbered about 14 stations. The petitioner sold its products and merchandise to the merchants or operators of the stations, for the most part, through the efforts of salesmen

or solicitors employed by it. One of such salesmen or solicitors lived, but
274 had no office, in the District of Columbia. His office was in Virginia, where was located the office of the other salesmen. The petroleum products were delivered to the gasoline sgations in trucks owned by the petitioner and loaded at storage facilities in Virginia maintained by the petitioner. The tires, batteries and accessories were shipped to the customers in the District from Maryland.

The petitioner had two offices, a garage and other facilities in nearby Virginia. It had no office, warehouse or other place of business or facility of any kind in the District of Columbia, and no officer, agent or representative with an office or place of business in the District.

The petitioner sold automobile tires, batteries and accessories to E. C. Green, who operated a gasoline station at 4515 McArthur Boulevard in Washington, D. C.,(2) who in turn, somewhat as a jobber or wholesaler, resold the merchandise to the other gasoline station operators as they needed it. Sometimes such merchandise was shipped from the storage facility in Maryland directly to the other operators. The transaction between Green and the petitioner was a sale transaction with title passing to the former.

(2) This was one of the stations owned or rented by the petitioner and either leased or subleased, as the case might be, to the operator or merchant.

He was not an agent or representative of the petitioner.

Under the law relating to the tax on, and the importing of motor fuel into the District of Columbia[3] the petitioner filed a written application with the Assessor for a license to import motor fuel into the District during the taxable years involved. The application was somewhat in the form of a questionnaire. Question 12 thereof read: "If a foreign corporation, name and address of resident general agent in the District of Columbia." The petitioner answered by giving its own name as "resident general agent" and the "address" as "5013 Georgia Avenue", in other words, the response read: "Cities Service Oil Company", "5013 Georgia Avenue, Washington, D.C." 275 The petitioner had no office, warehouse, place of business nor any gasoline station or other property at such address, nor did have any connection therewith. The Assessor, notwitstanding the failure of the petitioner to answer the question properly and supply the name of a "resident" agent, granted the petitioner a license to import motor fuel into the District of Columbia.[4]

The District of Columbia Income and Franchise Tax Act of 1947,

(3) Entitled "an Act to provide for a tax on motor fuels sold within the District of Columbia, and for other purposes", approved April 23, 1924, as amended; Chapter 19, Title 47, D. C. Code, 1951 Edition.

(4) The circumstances outlined in respect of the application for and the granting of the license to import motor fuel, apparently obtained for several years, both before and after the taxable years involved.

has been codified as Chapter 15 of Title 47 of the District of Columbia Code, 1951 Edition. It imposes a franchise tax upon corporations, measured by net income, for the privilege of engaging in, or carrying on any trade or business. Section 47-1551c(h) of the Code defines those terms as follows:

> "(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation, or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office: Provided, however, That the words 'trade or business' shall not include for the purposes of this article --
>
> "(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year."

The Court has found that the petitioner had no office, warehouse or other place of business, nor any officer, agent or representative with an office or other place of business in the District of Columbia, under the plain language of the proviso in Section 47-1551c(h) of the Code, the petitioner was not engaged in, nor carried on any trade or business in the District during the taxable years involved. The petitioner, therefore is not liable for any franchise tax measured by its net income fairly attributable to the sale of its petroleum products, and automobile tires, batteries and accessories for the taxable years involved. It is, however liable for a

276 franchise tax measured by the net income from rents received

from property in the District of Columbia, which it either owned or rented from owners and which it leased or subleased to gasoline station operators, as the case might be; concerning which tax situation the Court will comment in the later part of this opinion.

What the Court should now discuss is the argument of the respondent based upon the doctrine of estoppel, which the Court has carefully considered. What the respondent urges is the proposition that, having stated in the application for a license to import motor fuel that its "resident general agent" was itself, and that its address, not its office, was at 5013 Georgia Avenue, Washington, D. C., the petitioner is estopped from denying (a) that it had an office in the District; or (b) that it had an agent with an office in the District of Columbia. The Court cannot agree with any such contention.

The doctrine of estoppel is not applicable here for several reasons, among which are the following. There was no misrepresentation. The Assessor or his office knew that the petitioner was not, and could not be its own "resident general agent" for the purposes of the motor fuel tax and importing law. Both the petitioner and the Assessor or his office were wrong in the matter. When it appeared that the petitioner had failed to answer the pertinent question correctly, the Assessor or his office should have returned the application for proper preparation. Apparently the matter of the petitioner having a "resident general agent" was of little interest. Certainly no reliance could have been placed on the statement. The petitioner or its officers,

if credit can be given them for any common sense, did not intend the Assessor to rely upon such statement. Moreover, any evidence of change of position prejudically is lacking. Parker v. Sager, 85 U.S. App. D.C. 4, 174 F. 2d 657. And it might be added that the application and the information contained therein related to an entirely different tax situation or matter. The cold 277 fact remains that the petitioner had neither an office, warehouse, or other place of business nor an officer, agent or representative with an office or other place of business in the District of Columbia. For that reason the Court is of the opinion that the petitioner was not engaged in, and did not carry on any trade or business in the District during the taxable years involved within the meaning of the District of Columbia Income and Franchise Tax Act of 1947.(5)

The ruling just above made does not, however, dispose of the case. Consideration must be given to the fact that the petitioner received "other income as is derived from sources within the District", represented by rent received from the operators of gasoline stations or merchants for the use of such property, either owned by, or leased to the petitioner by the owners, and in turn leased or subleased, as the case might be to the operators.

The business of leasing and subleasing gasoline stations was carried on, or engaged in wholly within the District of Columbia. The Commissioners

(5) Chapter 15 of Title 47, D. C. Code, 1951 Edition.

have by regulation adopted a formula for allocation applicable to such business. While the Income and Franchise Tax Act (Section 47-1580a, D. C. Code, 1951 Edition) authorizes the Commissioners to adopt formulas only where the income "is derived from sources both within and without the District", the authority generally to adopt regulations granted the Commissioners in Title XVI of the Act (Section 47-1595, D. C. Code, 1951 Ed.) is ample authority for the formula, which, as far as applicable here, is in the language following:(6)

> "(3) Income for any taxable year derived from * * * rents * * *, which is derived from sources within the District shall be allocated to the District."

Moreover, the regulation conforms to the well established rule that the source of rental income is the situs of the rented property.

278 The evidence discloses certain facts concerning the rental of real property in the District of Columbia to gasoline station operators by the petitioner, that is to say, it shows that in connection with such business the petitioner incurred the expenses following:

Expenses	1952	1953
Rent paid on property subleased to operators	$56,234.06	$30,205.77
Real Estate Taxes	4,855.54	4,784.59
Depreciation	14,890.79	16,173.17

The petitioner failed to produce evidence of the amount of rent

(6) Section 10-2(d)(3), regulations pertaining to Income and Franchise Tax.

received by it from the gasoline stations. There was some evidence that in respect of one station it was subleased at a lower rental than that paid the owner by the petitioner, and that, perhaps, such was true as to some of the others. It is true that on the franchise tax return for 1952 there is allocated to the District of Columbia rental income of $58,335.18, and on the return for 1953 there was allocated rental income of $40,447.09, to the District. While the returns in some instances may be considered declarations against interest and their contents evidence against the petitioner, items of allocated rents received are not evidence to show what in fact were the gross rents received by the petitioner during the taxable years; and this is especially true where, as in the returns, there are no schedules or statements explaining the items.

For the reason stated above the Court is unable to make any finding as to the gross or the net rent received by the petitioner or to determine what is the correct amount of franchise taxes for which the petitioner is liable. The apparent probability that they should be less than the amount assessed the petitioner is not justification for cancelling the taxes or any part thereof. The burden was on the petitioner to show by competent
279 evidence what was the amount of gross rents received by it from real property in the District of Columbia during the taxable years.

In the condition of the record there is nothing for the Court to do

but to affirm the action of the Assessor in denying the claims for refund.

Decision will be entered for respondent.

/s/Jo V. Morgan
Jo. V. Morgan,
Judge.

* * *

280 FILED JUL 15 1957 DISTRICT OF COLUMBIA TAX COURT

DECISION

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearings on said petition, it is by the Court, this 15th day of July, 1957,

ADJUDGED AND DETERMINED, that the action of the Assessor in denying the claims for refund of franchise taxes for the years 1952 and 1953, paid by the petitioner, be and the same is hereby affirmed.

/s/Jo. V. Morgan
Jo. V. Morgan,
Judge.

* * *

287 FILED AUG 5 1957 DISTRICT OF COLUMBIA TAX COURT

ORDER

Upon consideration of the motion for reconsideration or, in the alternative, to reopen the proceeding for the purpose of introducing additional evidence and to vacate the adjudication of the Court, it is by the Court, this 5th day of August, 1957,

ORDERED, that the decision of this Court in the above-entitled cause dated July 15, 1957, be and the same is hereby vacated and set aside.

FURTHER ORDERED, that a rehearing of this proceeding be had to permit the petitioner to introduce evidence concerning net income received by the petitioner from rental properties in the District of Columbia during the taxable years 1952 and 1953, at 10 a.m., Thursday, August 15, 1957.

/s/ Jo. V. Morgan
Jo. V. Morgan,
Judge.

* * *

290 FILED SEP 25 1957 DISTRICT OF COLUMBIA TAX COURT

ADDITIONAL FINDINGS OF FACT AND SUPPLEMENTAL OPINION ON REHEARING

On July 15, 1957, after a hearing on the merits, this Court entered a decision affirming the action of the Assessor in denying claims for refund of franchise taxes for the years 1952 and 1953. The Court in its opinion,

filed on the same day, held that the petitioner had no office, warehouse or other place of business, nor any officer, agent or representative with an office or place of business in the District of Columbia, and, therefore, was not engaged in, nor carried on any trade or business in the District during the taxable years. The Court, however, ruled that since there was rental income of some amount collected by the petitioner, but no evidence of the exact amount, the Court was compelled to affirm the denial of the claims for refund. The petitioner then filed a motion for a rehearing to show the amount of rental income received by it. The motion was granted and a rehearing was had. The additional findings are as follows:

Additional Findings of Fact

10. During the calendar year 1952 the petitioner's accrued rental income from real estate owned and leased by it in the District of Columbia was in the amount of $58,230.18.

291 11. During the calendar year 1953 the petitioner's accrued net rental from real estate owned and leased by it in the District of Columbia was in the amount of $40,448.09.

Supplemental Opinion

During the years 1952 and 1953 the petitioner's accrued gross rental income from real estate owned and leased by it in the District of Columbia was $58,230.18 and $40,448.09, respectively. The specific

items of expense attributable to rental income from real estate owned and leased by the petitioner in the District of Columbia during the taxable years were the following:

	1952	1953
Rent Expense	$56,234.06	$30,205.77
Real Estate Taxes	4,855.54	4,784.59
Depreciation	14,890.79	16,173.17
Total	$75,980.39	$51,163.53

Since the expenses relating to the rented real estate were greater than the gross rental income, there was no franchise tax liability in respect thereto for years involved.

In its original opinion the Court held that the petitioner did not engage in, nor carry on any trade or business within the District of Columbia during the two years within the meaning of the District of Columbia Income and Franchise Tax Act of 1947 (Chpater 15, Title 47, D. C. Code, 1951 Edition). It therefore follows that the petitioner was not liable for franchise taxes in any amount for the years 1952 and 1953, and that the action of the Assessor in denying the claims for refund was erroneous and must be reversed with appropriate provision for refund.

Decision will be entered for petitioner.

/s/Jo. V. Morgan
Jo. V. Morgan,
Judge

* * *

292 FILED SEP 25 1957 DISTRICT OF COLUMBIA TAX COURT

DECISION

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearings on said petition, it is by the Court this 25th day of September, 1957,

ADJUDGED AND DETERMINED that the action of the Assessor in denying claims for refund of franchise taxes for the calendar years 1952 and 1953, filed by the petitioner was erroneous and is hereby reversed.

AND IT IS FURTHER ADJUDGED AND DETERMINED that a franchise tax for the calendar year 1952 in the amount of $5,145.24, plus interest in the amount of $106.57, or a total of $5,251.81 was erroneously paid by the petitioner; and that the petitioner is entitled to a refund thereof, with interest at the rate of 4 per centum per annum from January 3, 1956, to date of payment of refund.

AND IT IS FURTHER ADJUDGED AND DETERMINED that a franchise tax for the calendar year 1953 in the amount of $2,882.01, plus interest in the amount of $57.64, or a total of $2,939.65 was erroneously paid by the petitioner; and that the petitioner is entitled to a refund thereof, with interest at the rate of 4 per centum per annum from January 3, 1956, to date of payment of refund.

/s/Jo. V. Morgan
Jo. V. Morgan,
Judge

294 FILED OCT 24 1957 DISTRICT OF COLUMBIA TAX COURT

PETITION FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. The District of Columbia by and through its counsel petitions for a review by the United States Court of Appeals for the District of Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above-entitled proceedings.

2. The decision of which review is sought reversed a denial of a claim for refund of corporation franchise taxes for the calendar years 1952 and 1953 and ordered a refund to petitioner of corporation franchise tax for the calendar year 1952 in the amount of $4,145.24, plus interest in the amount of $106.57, or a total of $5,251.81, and a refund of corporate franchise tax for the calendar year 1953 in the amount of $2,882.01, plus interest in the amount of $57.64, or a total of $2,939.65, plus interest on said refunds at the rate of 4 per centum per annum from January 3, 1956 to date of payment of refund.

3. The decision of the Tax Court was entered on September 25, 1957.

* * *

1 DOCKET ENTRIES

DATE	PROCEEDINGS	MEMORANDUM
1957		
Jan. 2	Petition filed, Assessor, Corporation Counsel, and Attorney for Petitioner served.	Franchise Tax '52 $5,251.81 '53 2,939.65 $8,191.46
Jan. 28	Hearing set for Feb. 20. Notice sent to Attorneys for parties and Assessor	
Feb. 20	Hearing - Leo J. Ehrig, Jr. for District. Second hearing to be had March 28.	
March 28	Hearing - Leo J. Ehrig, Jr. for District.	
April 17	Brief filed by petitioner - Certificate of service	
May 10	Mot. for extension of time within which to file brief for resp. Granted. Copies mailed attorneys.	
May 14	Motion for leave to reopen proceeding for the purpose of introducing additional evidence - Certificate of Service.	
May 17	Affidavit in opposition to respondent's motion for reopening of proceeding - Memorandum and Order. Copies served parties.	
May 20	Brief for respondent - Certificate of service.	
May 31	Petitioner's reply brief - Certificate of service.	
July 3	Resp. motion for leave to file supplement to brief and certified copy of memorandum of U.S. District Court. Motion denied - Copies served attorneys.	
July 8	Memorandum in opposition to respondent's mot. for leave to file supplement to brief. Certificate of service.	

July 15 — Findings of Fact, Opinion & Decision, Assessor, Corporation Counsel & Atty. for Pet. served.

July 29 — Motion for reconsideration or, in the alternative to reopen the proceeding for the purpose of introducing additional evidence and to vacate the adjudication of the Court. Certificate of Service. Attorney for Petitioner served.

2
1957

July 31 — Petitioner's Memorandum. Certificate of Service. Attorney for Petitioner served.

Aug. 5 — Order - Corporation Counsel & Attorney for Pet. served.

Aug. 9 — Motion for adjournment of date of rehearing. Granted to Aug. 22. All parties served.

Aug. 14 — Resp. motion to reopen to permit respondent to introduce additional evidence. Motion granted - Copies mailed attorneys.

Aug. 15 — Memo. in opposition to mot. to permit respondent to introduce additional evidence. Certificate of service.

Aug. 22 — Third hearing - Leo J. Ehrig, Jr. for District.

Sept. 25 — Additional Findings of Fact, Supplemental Opinion and Decision.

Oct. 24 — Petition for Review filed by District. Designation of Record - Certificate of Service.

Nov. 19 — Order for Delivery of Original Exhibits - Copies mailed Attorney for Petitioner and Corporation Counsel.

BRIEF FOR RESPONDENT AND APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,238

DISTRICT OF COLUMBIA, *Petitioner,*

v.

CITIES SERVICE OIL COMPANY, *Respondent.*

Petition for Review of Decision of District of Columbia Tax Court

---

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United States Court of Appeals
For the
District of Columbia Circuit

FILED APR 14 1958

Joseph W. Stewart
CLERK

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

In the opinion of the respondent the following questions are presented:

1) On the record in this case, is the finding by the court below that respondent had no office or place of business within the district and had no agent or representative having an office or place of business therein clearly erroneous?

2) Is respondent estopped from showing it had no agent in the district because in answer to a question in an application for importer's license it gave the following answer to the following question?

> "(12) If foreign corporation, name and address of resident general agent in District of Columbia.
>
> Cities Service Oil Company
> 5013 Georgia Avenue
> Washington, D. C."

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,238

DISTRICT OF COLUMBIA, *Petitioner,*

v.

CITIES SERVICE OIL COMPANY, *Respondent.*

Petition for Review of Decision of District of Columbia Tax Court

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Respondent is a Pennsylvania corporation with its principal office in New York City. During the years in question, 1952 and 1953, the respondent had no office of any kind in the District of Columbia (P.A., F. 58). During these years it had no agent in the District of Columbia (P.A., F. 65). The closest office to the District of Columbia maintained by the respondent was in Arlington, Virginia (R.A., F. 140). Respondent sold petroleum products to independent service station dealers and consumers in the district. This product was shipped by truck from Arlington, Virginia (P.A., F. 64). Respondent's salesmen worked out of the Arlington, Virginia office (P.A., F. 65).

Tires, batteries and accessories were sold to service station dealers and others in the District of Columbia. Such sales were made by respondent from its warehouse in Baltimore (P.A., F. 79) or by one E. C. Green, who had previously purchased such merchandise from the respondent and acted as a wholesale reseller thereof (P.A., FF. 80-81). Mr. Green was not in the employ of the respondent (R.A., F. 70).

Respondent used a telephone answering service to take emergency messages or service calls during the night, Sundays and holidays over the winter months (P.A., F. 39). This service "simply took the emergency service call and called the service man" (P.A., F. 39).

During the years in question, respondent was required to and did obtain a license to import motor fuel into the District of Columbia. One of the questions appearing on the application for this license asked for the name and address of the corporation's resident general agent in the District of Columbia. The respondent in answer to this question stated "Cities Service Oil Company, 5013 Georgia Avenue, Washington, D. C." (Resp. Ex. D).

SUMMARY OF ARGUMENT

1) The respondent is exempt from tax on the sale of tangible property because it does not have a place of business in the district and does not have an officer, agent or representative having a place of business in the district (47-1551c(h), D. C. Code, 1951). The finding by the court below to this effect is not rendered erroneous because of the aforementioned telephone answering service in the district or because it sold tires, batteries and accessories at wholesale to one E. C. Green, a dealer in the district, who in turn resold them to customers in the district.

2) The respondent is not estopped from showing it had no agent in the district by its filing of the aforementioned application for gasoline importer's license.

ARGUMENT

POINT I

The Pertinent Taxing Statute Affords an Exemption for Sales of Property by a Corporation Which Does Not Have a Place of Business in the District and Which Does Not Have an Officer, Agent or Representative Having a Place of Business in the District. The Proof Is Clear, as Found by the Court Below, That Respondent Falls Within This Exemption

The sole issue in this case is whether the respondent has proved that it is within the exemption provided in the District of Columbia Income and Franchise Tax Act of 1947 as amended. The exemption is as follows:

> "(h) . . . Provided, however, that the words 'trade or business' shall not include, for the purposes of this article—
>
> (i) Sales of tangible personal property whereby title to such property passes within or without the district, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the district, and which has no officer, agent, or representative having an office or other place of business in the district, during the taxable years . . ." (Pet. Brief, p. 8).

Under the terms of the statute a corporation which sells property within the District of Columbia if it qualifies for the exemption is exempt from franchise tax on such sales. Respondent is not, as implied by petitioner, seeking to evade the laws of the district (cf. *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U.S. 125, cited Petitioner's Brief, page 30). Respondent has proved, as found by the court below, that it is within the very terms of the aforequoted exemption because during the pertinent period it did not physically have or maintain an office, warehouse or other place of business in the district and it did not have an officer, agent or representative having an office or other place of business in the district. The findings

of fact by the court below to this effect are fully and amply supported by the following testimony:

The Witness: Charles J. Himes.

"Q. Do you know all of the offices, establishments, warehouses and places of business that City Service Oil Company had in the years 1952 and '53 in and about the District of Columbia and its environs?
A. Yes, sir.
Q. Did you have an office of any kind in the District of Columbia?
A. No, sir". (P.A., F. 58)

By Mr. Colin:

"Q. Where do you make your office now?
A. 1011 Arlington Blvd., Arlington, Virginia.
Q. In the years 1952 and 1953, where did you make your office?
A. 1753 N. Arlington Ridge Road, Arlington, Virginia.
Q. Will you tell us where those establishments were at that time?
A. We had an office at 1421 Jefferson Davis Highway, Arlington and 1753 North Arlington Ridge Road, Arlington.
Mr. Colin: When you say "offices", you include warehouses, bulk plants and any other type?
The Witness: Yes, sir.
The Court: Only two places of business establishment were these two places?
The Witness: Yes, sir." (R.A., FF. 58-59)

"Mr. Ehrig: Keep in mind all of these questions are for 1952 and 1953, unless I designate otherwise. Do you today have a salesman in the District of Columbia?
The Witness: A salesman?
Mr. Ehrig: Yes, with an office in the District of Columbia?
The Witness: No, sir, our salesmen work out of Virginia. We have a TBA Agent.

By Mr. Ehrig:

Q. What is that?
A. Tires, batteries and accessories. No, we don't,

that thing wasn't signed. No, we have no agents in the District of Columbia." (P.A., F. 65)

Witness: Sidney L. Paddock.

"Q. You stated in response to a question on direct examination that the office of City Service in this area was in Arlington?

A. In Arlington.

Q. Was there an office in the District of Columbia?

A. Not to the best of my knowledge. City Service Company, but not City Service Oil Company." (P.A., F. 141).

"Q. Confining yourself to the years 1952 and '53 in your answers, Mr. Paddock, where was the office of City Service Oil Company in this area?

A. In 1952 and '53 when I first came here, it was in Rosslyn and then we moved to Jefferson Davis Highway, but I would say we were down at Jefferson Davis Highway, in '52 and '53.

Q. In what municipality?

A. That is in Arlington.

The Court: What?

The Witness: Arlington.

The Court: Virginia?

The Witness: Yes, sir.

By Mr. Colin:

Q. And still confining yourself to those years, '52 and '53, where did City Service Oil Company have a plant or warehouse in this locality?

A. We have one warehouse there for oils and one at Rossyln for light oils.

Q. When you say 'there', where do you mean?

A. In Arlington.

Q. Were there any other offices, warehouses or places of business of City Service Oil Company in this area in those years?

A. Not to my knowledge.

Q. Did City Service Oil Company directly through its own employees in those years operate any service stations?

A. Not to my knowledge, not in '52.

Mr. Colin: That is all, Mr. Paddock. (R.A., FF. 140-141)

Witness: Ralph A. Cuthbertson.

By Mr. Colin:

"Q. Mr. Cuthbertson, are you able to tell us whether or not City Service Oil Company had an office or business establishment in the District of Columbia?
A. They did not.
Q. Referring to the years 1952 and '53?
A. Right." (R.A., F. 181)

Faced with this overwhelming proof that the respondent is within the exemption provided in the taxing statute, the following comment on the nature of the evidence was made by the counsel for the petitioner.

"Mr. Ehrig: No, I long ago stated to your Honor that we are not trying to prove that they physically have an office or agent here. They may have, but *certainly there is nothing in this case to show it.* We are riding simply on the estoppel theory one hundred percent." (R.A., F. 261) (Emphasis supplied).

This concession confirms the correctness of the court's findings which on this appeal may not be upset unless clearly erroneous and not based on substantial evidence (*Coleman* v. *U. S.*, (1949), 176 F. 2d 469, 472). In the light of the record, counsel's concession and the court's findings, the contention of the petitioner that a telephone answering service in the district and an independent purchaser of respondent's product therein constituted respondent's agents for purposes of taxation must be viewed as a desperate grasping at straws.

During the winter months the respondent used this telephone answering service to take emergency calls for oil burner repairs during the night, Sundays and holidays (P.A., F. 39). The transmittal of messages of so limited a nature during so limited a period self-evidently cannot constitute the agent described in the exemption to the taxing statute.

It is patent from the record herein that the relationship between the respondent and the telephone answering service was one of total independence having none of the indicia of agency as that term is used in the taxing statute, Section 47-1551c(h), D. C. Code, or understood in the law. The telephone answering service had absolutely no authority, express or implied, to bind the respondent or otherwise participate in the respondent's business. It was engaged solely to transmit messages dealing with service and is no more an agent of the respondent's than is the local telephone company.

Equally without merit is the petitioner's contention that one E. C. Green, a purchaser for resale of the respondent's products, constituted an agent or representative of respondent having an office or place of business in the district. At page 19 of its brief the petitioner attacks the findings of the court below that "the transaction between Green and the petitioner was a sale transaction with title passing to the former" on the ground that there is no competent evidence in this record to support such statements. At page 8 (F. 69) of the petitioner's appendix, the following exchange is recorded:

> "Mr. Ehrig: What does Mr. Green do with the goods in his Garage?"
> The Witness: "He sells them."
>
> By Mr. Ehrig:
>
> Q. "To his merchants?"
> A. "Merchants buy their own. *Mr. Green actually buys them from us and sells them.*" (Emphasis supplied)

The witness Paddock testified to the same effect at page 31 (F. 153) of the petitioner's appendix:

> "Q. Does your company sell those products, tires and batteries?
> A. I am trying to think how to answer you. We sell tires to a distributor and he in turn sells the tires to the dealers. Is that what you want to know?

Q. I just want to know the facts, sir. Who is the distributor?
A. Mr. Green."

These uncontroverted statements by the witnesses render incomprehensible the statement of the petitioner at page 19 of its brief that the "Tax Court erred when it found that Green purchased the merchandise from the respondent, and that he was not employed by respondent (P.A., 57). There is absolutely no competent evidence in this record to support these findings." To the contrary, there is not an iota of evidence in the record to contradict the above quoted statement of the respondent's witnesses that Green purchased from the respondent and resold. The court's finding that Green was not an employee of respondent is fully supported by the statement of the witness that "he (Green) isn't employed by City Service, to the best of my knowledge. He is not." (R.A., F. 70)

There is ample evidence in the record that Mr. Green was not an agent of the respondent and a total absence of any evidence indicating he was respondent's agent. In addition, respondent offered in evidence invoices to show that Green was a purchaser of respondent's products. (R.A., FF. 92 to 94). This proof was erroneously excluded by the court (R.A., F. 98). Had this evidence been admitted, as it should have been, there would have been documentary corroboration in the record of the already clear and sufficient testimony that Green was a buyer and reseller of respondent's products—not its agent. In all events, all the testimony in the record supports the court's finding that Green was an independent contractor; the only suggestion otherwise is contained in the unsupported statements in petitioner's brief.

POINT II

The Doctrine of Estoppel Is Not Applicable to the Circumstances of This Case

Petitioner's counsel stated during the trial "we are riding simply on the estoppel theory one hundred percent".

In effect, petitioner has declared that it is prepared to stand or fall on the sufficiency of this defense.

In finding against any estoppel in this case the trial court cited the case of *Parker* v. *Sager,* (1948) 85 U.S. App. D.C. 4, 174 F. 2d 657, in which this Court summarized the essential elements of estoppel as follows:

As related to the party estopped:

"(1) Conduct which amounts to a false misrepresentation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise inconsistent with those which the party subsequently attempts to assert;

(2) Intention, or at least expectation, that such conduct shall be acted upon by the other party;

(3) Knowledge, actual or constructive of the real facts."

As related to the party claiming the estoppel, the essential elements are:

"(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;

(2) Reliance upon the conduct of the party estopped; and

(3) Action based thereon of such a character as to change his position prejudicially."

The main contention of the petitioner is that an application filed by the respondent in order to obtain a license to import motor fuel contains a question and answer which estops the respondent from showing it had no agent in the district during the years 1952 and 1953. It must be particularly emphasized that this application was entirely unrelated to the corporate franchise tax, the tax herein involved, and that it was not filed even in the department which administers the tax here in issue. Indeed, it does

not appear that this application came to the notice of the taxing authorities prior to the institution of the present suit. Yet on the basis of the following question and answer appearing in the application petitioner urges that the respondent is estopped to deny the existence of an agent in the district in 1952 and 1953:

> "12. If foreign corporation, name and address of resident general agent in District of Columbia.
>
> Cities Service Oil Company
> 5013 Georgia Avenue
> Washington, D. C."

Applying the principles set forth in the Parker case to the facts of this case, it becomes obvious that the doctrine of estoppel is totally inapplicable.

(1) *There is no false representation.*

The answer to question 12 of the application is self-contradictory. Cities Service Oil Company could not be the agent of Cities Service Oil Company. No reasonable man could read this answer to this question and receive the impression that Cities Service Oil Company had an agent in the District of Columbia. If it had such an agent or if it "calculated to convey the impression" that it had such an agent it would either have named the agent or, if it chose to deceive, would have given the name of anyone other than itself. It could not hope to deceive anyone by naming itself as its own agent. Whatever representation may be contained in the answer to the question, it is clearly not a representation that the respondent had an agent in the district.

(2) *There was no intention and no expectation that the question and answer would be acted upon by the petitioner.*

The employee of respondent who supplied the answer to question 12 in 1952 and 1953 would have required sub-

stantial powers of clairvoyance if he could foresee that the taxing authorities would assume from his answer in an application having nothing to do with franchise tax that he was telling them the respondent had an agent in the district and was, therefore, subject to franchise tax. There is not a shred of evidence showing that respondent intended or expected that the answer would be acted upon by petitioner in relation to a franchise tax question.

This application was submitted in order to obtain an importer's license. The importer's license issued thereafter and all fees and taxes in connection therewith have been paid. There could have been no expectation by the respondent that an application for importer's license would be acted upon by the petitioner in any matter not relating to an importer's license.

(3) *There was no reliance by the petitioner of such a character that it changed its position prejudicially.*

No reliance which could conceivably affect the outcome of this case was placed upon respondent's answer to the question by the petitioner. The petitioner urges that because of this statement it issued a motor fuel importer's license to the respondent which it would not have done if it knew the respondent had no resident general agent but only a local agent for the service or process.

Assuming, arguendo, that this is the case, there is nevertheless lacking any proof that the appellant suffered detriment thereby. There is no proof that the nominal license fee was not paid; that it was in fact paid is attested by the very issuance of the license. The only other detriment which appellant could possibly claim is that respondent failed to pay the gasoline taxes due the district. There is no such claim and no such proof—and the fact is to the contrary.

The highest court of the State of New York in a case concerning an actual misrepresentation known to be such

and intended to be such has held that the doctrine of estoppel will not be applied where the party asserting the estoppel has lost nothing in reliance upon the misrepresentation.

In the case of *Farley* v. *Scherno,* (1913), 208 N.Y. 269, the defendant had stated in an application for a liquor license that the premises where the liquor was to be sold were owned by the applicant's wife and the applicant could lawfully traffic in liquors thereon. An action was brought to recover a penalty on the bond which was given on the issuance of the liquor tax certificate. The defense was that, contrary to the statements in the application, the premises involved were a part of a military post of the United States whereon traffic in liquors was unlawful. The court sustained the defense and commented as follows on the doctrine of estoppel:

> "It has been ruled below that the defendants are estopped by statements in the application to deny that the traffc in liquors could lawfully be carried on on said premises. But the case lacks one of the essential elements of an estoppel. The state has lost nothing in reliance on the statements in the application. Indeed it has received the license tax . . ."

Thus even in a case in which the misrepresentation is intentional and clear, it remains a necessary element of estoppel, as this Court has held, that it be shown that the party asserting the estoppel has somehow suffered a detriment in reliance on the misrepresentation. A fortiori, where the statement relied upon is an innocent contradiction recognized to be such by any reasonable man and intended to deceive no one, the absence of a detriment forestalls the application of the doctrine. In the instant case, as in the last cited case, the license tax was paid.

The absence of any one of the foregoing necessary elements of estoppel serves to defeat the defense. None of the foregoing necessary elements finds any support in this record.

Finally, assuming arguendo, that the doctrine of estoppel could have any application herein, what is the respondent estopped from denying? It is estopped from denying that the respondent is its own local agent. Aside from the absurdity implicit in the same entity being its own agent, there still remains the statutory necessity of the agent "having an office or other place of business in the district", during the taxable year. Not even the petitioner urges that the respondent itself had an office or place of business in the district since as shown by the record it clearly did not. If the respondent is estopped from denying that it is its own agent it is not estopped from showing, as it did show, that it had no office or place of business in the district. As pointed out by the court below the address given by the respondent in its application for a motor fuel importer's license is not an office or place of business of respondent's and is not stated to be such (R. A., F. 204), —it purports merely to be what the form called for, an "address." It is self-evident that the designation of an "address" is not tantamount to the designation of an office or place of business.

Recognizing this deficiency in its argument, petitioner attempts to find a representation in the franchise tax returns that repondent had an office or place of business in the district. The heading of the return, set out at page 28 of petitioner's brief, calls for the name and business address of the corporate taxpayer. Respondent gave for a "D.C. address" the address of a gas station in the district and then gave for its mailing address its New York office. It is submitted that no one could find in this document anything approaching a statement that respondent had an office or place of business in the district. Respondent gave its "business address" when it gave its mailing address as 70 Pine Street, New York, New York, the principal office of the respondent. It is not the fact that 5013 Georgia Avenue, N.W., Washington is an office or place of business of the respondent and no such representa-

tion was made. Of course, with respect to the franchise tax returns the earliest return in evidence is for 1952 and since it was filed at the end of the taxable period, no representation of any kind could affect respondent's liability for tax during 1952.

Thus the estoppel doctrine cannot help the petitioner for the reason that even if it were applicable its application is incomplete, since at most the respondent would be prevented from denying the presence of an agent in the district; but under no theory can it be prevented from showing that the agent had no office or place of business therein. But the mere presence of an agent without an office or place of business in the district is not sufficient to take the respondent out of the exemption contained in Section 47-1551c(h) D.C. Code.

CONCLUSION

The findings of the court below are fully and amply supported by the record in this case. In fact, findings to the contrary would have no basis whatsoever on this record. No estoppel was established in fact or in law. The decision of the court below should therefore be affirmed.

Respectfully submitted,

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APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,238

DISTRICT OF COLUMBIA, *Petitioner,*

v.

CITIES SERVICE OIL COMPANY, *Respondent.*

Petition for Review of Decision of District of Columbia Tax Court

23

EXCERPTS FROM PROCEEDINGS

* * * * * * * * * *

The Court: Mr. Wixon, what allegations in the petition do you concede?

* * * * * * * * * *

24 Mr. Ehrig: We will agree to paragraph number 1; we have no objection to paragraph number 2.

The Court: How about the facts in 3, those are easily ascertained?

Mr. Ehrig: I believe number 3, also.

* * * * * * * * * *

25 Mr. Colin: All right, sir. Your Honor, I move to add to paragraph 3 of the petition, as filed, that on or about January 3, 1956, the petitioner duly filed with the Assessor for the District of Columbia, applications for refund of franchise tax for the years 1952 and 1953.

The Court: You say "application," I think we might use the technical term which is "claim for refund."

Mr. Colin: Claim for refund, sir.

* * * * * * * * * *

26 Mr. Wixon: For the information of the Court, our file shows one of these claims was received on January 6, 1956, and the other one January 4, 1956. The one of January 4 was for the period January 1, 1952, to September 31, 1952, and the one filed January 6, 1956, was for the period January 1, 1953 to December 31, 1953. Those periods to which I refer are the periods for which franchise taxes are imposed.

* * * * * * * * * *

The Court: I will grant the motion. Miss Reporter, please read his language back to me.

* * * * * * * * * *

28

Robert H. Pyke

was called as a witness for the petitioner and, having been duly sworn, was examined and testified as follows:

* * * * * * * * * *

30 Mr. Colin: We will offer these if your Honor please.

The Court: Received in evidence, petitioner's Exhibits 1 and 2, and you may substitute copies.

(Whereupon, Exhibits 1 and 2 were marked for identification and received in evidence.)

* * * * * * * * * *

31 Q. Mr. Pyke, I hand you the original papers furnished by the government entitled "Claim for Refund of Income of Franchise Tax" covering the years 1952 and 1953, excluding from the offered exhibit transmittal now appended to each, and ask whether you prepared these claims? A. (After examination) Yes, sir, I did.

Q. All right, I will offer these.

* * * * * * * * * *

(Whereupon, Mr. Petitioner's Exhibits Number 3 and 4 were marked for identification and received in evidence.)

* * * * * * * * * *

By Mr. Colin:

Q. In specific terms, will you tell us what, if anything, had been omitted from your figures in the preparation of the return? A. It was not exactly an omission, it was just what I considered an error, as I stated, in apportioning on the basis of a factor rather than specific allocation, because I had allocated the gross rent income and I believe I should have specifically allocated the expenses applicable thereto, rather than using the apportionment factor.

Q. Now the expenses that you referred to in respect to rents were rents payable, is that correct? A. That is one of them, yes, sir.

Q. The other was real estate taxes? A. Yes, sir.

Q. And the third was depreciation, is that so? A. Yes, sir.

* * * * * * * * * *

By Mr. Colin:

Q. Now, Mr. Pyke, adverting to the item of depreciation, will you tell us how you arrived at the figure which is presented in this summary sheet which has been offered in evidence?

Incidentally, your Honor, may I, at this time for identification, have these two sheets marked? We have been referring to them.

The Court: They will be marked for identification. That would be petitioner's exhibits five and six, for identification.

(Whereupon, Petitioner's Exhibits No. 5 and 6 were marked for identification.)

* * * * * * * * * *

57

Mr. Charles J. Himes

was called as a witness for the petitioner and having been duly sworn, was examined and testified as follows:

* * * * * * * * * *

58 By Mr. Colin:

Q. Where do you make your office now? A. 1011 Arlington Blvd., Arlington, Virginia.

Q. In the years 1952 and 1953, where did you make your office? A. 1753 N. Arlington Ridge Road, Arlington, Virginia.

* * * * * * * * * *

Q. Will you tell us where those establishments were at that time? A. We had an office at 1421 Jefferson Davis Highway, Arlington and 1753 North Arlington Ridge Road, Arlington.

* * * * * * * * * *

59 Mr. Colin: When you say "offices," you include warehouses, bulk plants and any other type?

The Witness: Yes, sir.

The Court: Only two places of business establishment were these two places?

The Witness: Yes, sir.

* * * * * * * * * *

63 Q. Now, who were the authorized personnel for the signing of contracts and agreements on behalf of City Service Oil Company in this area we are speaking of? A. Who were the authorized personnel?

* * * * * * * * * *

64 The Witness: There was a General Manager, General Sales Manager then.

Mr. Colin: Was that the man who was authorized to sign?

The Witness: Yes, sir.

The Court: Where was this General Sales Manager's office?

The Witness: 1421 Jefferson Davis Highway in Arlington.

* * * * * * * * * *

70 Q. Has he ever been employed by City Service?
A. No, sir, not to my knowledge.

The Court: When you say, "No, sir," he asked you a question, "Do you know if he is employed by City Service," and you say, "No, sir." Do you mean you don't know whether he is employed or he was not employed?

The Witness: Well, he isn't employed by City Service, to the best of my knowledge. He is not.

* * * * * * * * * *

89 The Court: Does the petitioner have any stations, gas stations in the District which it operates itself?

The Witness: The Company?

The Court: Yes?

The Witness: Yes, sir.

The Court: How many?

Mr. Colin: Your Honor, may I interrupt, sir. I think we want to talk about 1952 and 1953.

The Witness: No, sir.

The Court: Did not have any then?

90 The Witness: No.

* * * * * * * * * *

91

Sidney L. Paddock

was called as a witness for the petitioner and having been duly sworn, was examined and testified as follows:

* * * * * * * * * *

Direct Examination

By Mr. Colin:

Q. Mr. Paddock, you are employed by the petitioner, City Service Oil Company and were employed by that Company in 1953 and '53? A. Yes, sir.

Q. What was your job in those years? A. Commercial salesman.

* * * * * * * * * *

Q. I show you some papers and ask you whether these do not represent invoices which are rendered by City Service Oil Company to its customers? A. (After in-
92 spection) When you speak of customer, this is billed to Mr. Green.

Q. Is this a typical City Service Oil Company invoice? A. Yes, sir.

Q. In 1952 and '53? A. Yes, sir.

* * * * * * * * * *

Mr. Colin: They do, sir. I will offer them. The question is withdrawn. I will offer the invoices.

Mr. Wixon: For what purpose may we inquire?

Mr. Colin: These are invoices to Mr. Green, Mr. Wixon. They show the nature of the dealings in respect to TBA.

* * * * * * * * * *

The Court: The witness has testified, as I understand it, that they are typical.

Mr. Wixon: Typical invoices.

The Court: I am going to allow them to be introduced in evidence for the purpose of showing two things, the
93 material that was sold on those particular days and coupled with the witness' testimony that they are typical of transactions between the Company and Mr. Green.

* * * * * * * * * *

The Court: I will adhere to my ruling with the limit I put on it. It will be Petitioner's Exhibit 7-A, B, C, D, and so forth.

(Whereupon, Petitioner's Exhibits 7-A through 7-J were marked for identification.)

The Court: Now, before you proceed, I take it that the witness' testimony is that these invoices illustrate or

show the nature of the transactions and the mode of business with Mr. Green in the years 1952 and '53, is that correct, Mr. Witness?

The Witness: That is correct.

* * * * * * * * * *

94 Mr. Ehrig: Are these bills that you made out, sir, for Mr. Green?

The Witness: No, sir.

Mr. Ehrig: Who made the bills out for Mr. Green, do you know?

The Witness: These were made up in Baltimore, the stock clerk in our warehouse.

Mr. Ehrig: Do you know that, sir?

The Witness: He has made them up plenty of times.

Mr. Ehrig: Do you know of your own knowledge that he made them up?

The Witness: I can say he was actually the one that did it.

Mr. Ehrig: Did you bring this paper (indicating)?

The Witness: No, I did not.

Mr. Ehrig: Who brought them?

Mr. Colin: I brought them.

Mr. Ehrig: Do you know where they came from?

The Witness: I assume he picked them up.

Mr. Wixon: If your Honor please, there is a supposition here.

The Court: Wait a minute, Mr. Wixon. Mr. Colin, I think he is right.

Mr. Colin: This is just proof of a system and the witness is familiar to cite the system.

* * * * * * * * * *

95 The Court: I am going to sustain the objection to those and they will be marked for identification only and you may want to supplement the information later on it, I don't know.

Mr. Colin, if you had proof that they were made in the

ordinary course of business, I would admit them under the shop book theory but he doesn't know.

Mr. Colin: I will develop that now.

By Mr. Colin:

Q. Are you familiar with petitioner's system in the preparation of invoices covering the delivery of merchandise to its customers? I'm referring particularly to TBA? A. That is the form that TBA Department uses out of Baltimore for delivery whether to a service station or to Mr. Green.

Q. How frequently have you had occasion to see forms such as these used by the City Service Oil Company?

A. How frequently? I would hate to say, I have
96 seen so many. After all, I have been with the Company some 20 years, so I'm bound to have seen quite a few of them in one place or another.

* * * * * * * * * *

97 The Court: I don't think so. I think the person has to testify of his own knowledge that the records were made and used in the ordinary course of business.

Mr. Colin: Yes, sir, and this witness can so testify.

The Court: He can testify that they make vouchers like that and invoices but he doesn't know about those. This is the first he saw them apparently and as far as the record is concerned, you brought them yourself.

Mr. Colin: Your Honor, what would be the purpose of the shopbook rule if direct knowledge is required by the witness? The shopbook rule was evolved——

* * * * * * * * * *

The Court: He has no connection with the Baltimore office, the office that made those. He has nothing to do with the making of those vouchers. He has no connection at all with the making of those invoices.

Mr. Colin: If the witness testifies to a familiarity, your Honor, then I submit that the requirements of the shopbook rule have been satisfied.

* * * * * * * * * *

98 The Court: I will sustain the objection.

* * * * * * * * * *

106

Robert H. Pyke

* * * * * * * * * *

Direct Examination:

Mr. Colin: Your Honor, through the very fine cooperation of Government counsel, we have checked through with the Assessor and counsel's office, the record and underlying data of the petitioner relating to incumbent expenses in the District and reconciled and verified a summary statement as prepared by this witness. I will at this time, therefore, show Mr. Pyke this paper and ask whether this is a summary which you have prepared, Mr. Pyke, of expense deductions and a computation of the refund as you computed it?

The Witness: It is, sir.

Mr. Colin: I will offer it.

* * * * * * * * * *

107 Mr. Ehrig: May I say this, your Honor, just the first three items under rent expense, real estate tax and depreciation were the figures stipulated to.

The Court: That is understood. They will be marked and received.

* * * * * * * * * *

108 By Mr. Colin:

Q. Now, I show you another sheet of paper, Mr. Pyke, and ask whether this is a similar summary which was prepared in respect to the year 1953? A. Yes, sir, it is.

Mr. Colin: I offer it.

The Court: You have the same objection and I will make the same ruling with the same understanding that only the first three items——

Mr. Ehrig: That is correct, your Honor, and the rest being simply counsel's method of apportionment.

(Whereupon, Petitioner's Exhibit No. 9 was marked for identification and received in evidence.)

* * * * * * * * * *

120 Mr. Colin, do I understand that you still rely on the fact that during the years of 1952 and '53, you had no office agent or representative having an office or other place of business in the District?

Mr. Colin: We rely on that and if that is established to your Honor's satisfaction, it will be completely dispositive of our tax liability with that complete refund. In the alternative, sir, we have introduced by amendment, the recomputation of our liability, which even if we were held to be subject to the tax, would result in the refund as shown in our summary sheets, Petitioner's 8 and 9.

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124 Mr. Colin: Your Honor, may I have a continuing objection to this line of inquiry.

The Court: Yes, I will make the same ruling.

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131 Q. Are any of these properties that City Service Oil Company either bought outright and obtained title to or leased and in turn leased by City Service Oil Company to anybody? A. Yes, sir.

Q. How many of those are leased to other persons? A. All of them.

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137 By Mr. Wixon:

Q. Did you have any occasion when you got the figures on rent expense to look in the books and records of the corporation to find that? A. Yes, sir.

Q. Where were those figures taken from? A. Where were they taken from?

Q. Taken from, yes. They are stipulated as being correct. I want to inquire where they were taken from? A.

From the rent paid ledgers, cash vouchers and transfer vouchers.

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139

Sidney L. Paddock

was recalled as a witness for the Petitioner and having been duly sworn, was examined and testified as follows:

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Q. Confining yourself to the years 1952 and '53 in your answers, Mr. Paddock, where was the office of City
140 Service Oil Company in this area? A. In 1952 and '53, when I first came here, it was in Rosslyn and then we moved to Jefferson Davis Highway, but I would say we were down at Jefferson Davis Highway in '52 and '53.

Q. In what municipality? A. That is in Arlington.

The Court: What?

The Witness: Arlington.

The Court' Virginia?

The Witness: Yes, sir.

By Mr. Colin:

Q. And still confining yourself to those years, '52 and '53, where did City Service Oil Company have a plant or warehouse in this locality? A. We have one warehouse there for oils and one at Rosslyn for light oils.

Q. When you say "there," where do you mean? A. In Arlington.

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Q. Were there any other offices, warehouses or places of business of City Service Oil Company in this area
141 in those years? A. Not to my knowledge.

Q. Did City Service Oil Company directly through its own employees in those years operate any service stations? A. Not to my knowledge, not in '52.

Mr. Colin: That is all, Mr. Paddock.

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144 Q. What is it? A. Just a magazine with articles relating, maybe, by outside people on oil exploration or if we launch a boat, there might be an article about the launching, it is just a plain magazine like the "Saturday Evening Post," or "Readers Digest," or anything else.

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159 Mr. Colin: I would like to move, your Honor, in view of the fact that there are some slight discrepancies in the figures in the petition as amended and summaries as offered, I would like to move to conform the pleadings.

The Court: In what respect? Have you the petition there, Mr. Wixon? What would you change?

Mr. Colin: I'm just trying to catch the discrepancy, your Honor.

The Court: You can't get more than you claimed in the refund?

Mr. Colin: No, sir, it does not result in that. There was in the working up of the summaries which have been marked as Petitioner's 8 and 9, we came upon some small discrepancies which result in differences between the allegation and the summary of a small sum, perhaps a hundred or so dollars in one respect.

The Court: In 1952, you have $5,251.81. That is what you claimed in refund. I don't think you get any more than that.

Mr. Colin: That is the amount paid, your Honor, that is a correct figure. The discrepancy——

160 The Court: (Interposing) Your 1952 computation in petition, Exhibit No. 8—that is right.

Mr. Colin: The discrepancy was in the expense items, your Honor. There was some small discrepancy, not a great sum, and it has a very negligible effect on the final figure, the refund figure.

The Court: Well, you claim only in this 1952, in the computations, $3,863.77.

Mr. Colin: Your Honor, I think I can give you the discrepancy. For example, in the amendment, we had for '52, if you will look at the notice of the intention to amend, which was incorporated in our motion, we had a rent paid item of $49,368.30. If you will look at the summary which has been marked as Petitioner's 8, the rent paid was $56,-234.06. The tax item is unchanged and the following item is unchanged.

The Court: Mr. Wixon, he has made a motion to amend.

Mr. Colin: Just to conform the pleadings to the proof.

The Court: I understand.

Mr. Wixon: Do you have any objection?

Mr. Wixon: We have no objection.

Mr. Ehrig: I don't think so, the figures are there.

The Court: All right, we will physically amend
161 that to $56,234.06. Before Mr. Wixon starts, I don't understand this Exhibit 8 and I haven't Exhibit 9 before me, but in your claim for refund and in your petition, you claim $5,251.81.

Mr. Colin: Referring to eight at this time?

The Court: Eight, but in Exhibit eight, you only claim $3,863.77.

Mr. Colin: That is an alternative claim, if your Honor pleases. The $5,251.81 is the total amount paid by us and if your Honor should find that we are within the exemption, therefore, we would be entitled, on such a finding, to an entire refund of that sum.

The Court: O.K.

Mr. Colin: However, if your Honor should find we are not exempt, then the correction of our figures, as originally returned, we say, would entitle us to this lesser refund.

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162

Ralph A. Cuthbertson

was called as a witness for the Respondent and having been duly sworn, was examined and testified as follows:

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176 Q. Very well, sir. Let me ask you a question about the City Service Company. That is your parent organization, is that correct? A. Parent company, yes, City Service Company.

Q. Do they have an office in the District of Columbia? A. I have heard that they have a location, which is used for get-together sessions generally in Washington, D. C. It is not classified, as far as I know, as an official office of the company. It is an address they maintain.

Q. This is another address, this is not an office? A. I wouldn't call it an office.

Q. Where is the location of this? A. I have heard of it as the Ring Building but I have no idea of where it is.

Q. That is an office building in the City? A. I think it is but I don't know where it is. I have never been there.

Q. You have never been in? A. I have never been in City Service's office in Washington.

Q. Are you an officer of City Service Company? A. No.

177 Q. Who is the President of City Service Oil Company? A. Mr. Stauffacher, E. L. Stauffacher.

Q. Is he an officer in the City Service Company? A. No.

Q. He is not? A. No.

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181 By Mr. Colin:

Q. Mr. Cuthbertson, are you able to tell us whether or not City Service Oil Company had an office or business establishment in the District of Columbia? A. They did not.

Q. Referring to the years 1952 and '53? A. Right.

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200

John C. Ahearn

was called a as witness for the respondent and, having been duly sworn, was examined and testified as follows:

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202 Mr. Colin: This question, if your Honor please, relates to whether they would have issued a license to import motor fuel which is in no way material to the question of refund of tax to corporation franchise.

The Court: What they are trying to prove, that somehow or other, they said it was their office in the District of Columbia. Anyhow, I am sustaining the objection to the question for this reason. In the first place it is hypothetical. Secondly, when it is so manifest that whoever read that application did not know what a resident agent was, and they accepted that when they should have sent it back and said you have not answered the question. We want the name of someone we can sue, serve, that is what the purpose of the thing is manifest. What was intended by that, in all such things, is to name some person, someone in the District of Columbia upon whom I can serve, process.

Mr. Ehrig: Let me ask this question. It is manifest to your Honor. Mr. Ahearn acts on these; was it manifest to you, Mr. Ahearn?

The Court: What difference does it make to Mr. Ahearn? You can't prove that these people had an office in the District of Columbia by any such——

203 Mr. Ehrig: (Interposing) Let me say we are not trying to prove physically they have an office. I realize if the secretary of the corporation gets on the stand and says, "We do not have an office," that finishes it, but not from the District of Columbia point of view. If that was our sole case, it would be ridiculous for us to even be here today.

I can't get on that stand and contradict Mr. Cutbertson and say, "You do." Our theories would then be of law and that is estoppo; in estoppo, you have to show they are estopped by reason of the fact they were granted a privilege because they did say they had an office at the time.

The Court: They did not say they had an office in the District of Columbia.

Mr. Ehrig: If your Honor please, I think the record shows it. Your Honor's construction might be the record does not show it, but I have a right to go further there. Read it.

The Court: Now what does it say?

Mr. Ehrig: It says that the address, I can separate the two, I do not have to take the title letter, address of the resident general agent is 1513.

The Court: Is that your contention it means office?

The Witness: Yes.

The Court: I am talking to Mr. Ehrig.

Mr. Ehrig: I will read it. "If a foreign corporation," that is so in this case, "name" that is one part of the
204 question, "address of the resident general agent."

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The Court: They have not stated in that paper that they had an office in the District of Columbia. It does not prove it.

Mr. Ehrig: I do not say that the paper does, your Honor.

The Court: What should have been done in that instance, what should have been is the insertion of a resident agent, and they do not do it.

205 Mr. Ehrig: I agree, of course, if they named the man, your Honor would be satisfied.

The Court: In all due respect, if someone in the Assessor's Office had understood what the resident agent meant, they would have sent it back and said that you have not answered it correctly, we would like to have you answer it correctly.

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218

William R. Budd

was called as a witness for the Petitioner, and having been duly sworn, was examined and testified as follows:

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220 By Mr. Colin:

Q. Mr. Budd, I show you three sheets of paper and ask you to tell me what they represent? A. These three sheets of paper represent a summary of the rentals collected during the years 1952 and 1953.

Q. From the District of Columbia properties of Cities Service, is that right? A. From the District of Columbia properties.

Q. Keep your voice up so his Honor can hear you. Have you personally checked over the content of that summary, Mr. Budd? A. Yes, sir, I have, and found it to be correct.

221 Mr. Colin: I will offer this summary into evidence.

The Court: Was this made under your supervision?

The Witness: It was prepared by the Tax Department.

The Court: You have checked it?

The Witness: Yes, and found it to be correct.

The Court: All right.

Do you have any objection, Mr. Ehrig?

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227 Q. The Court: I see both your points. Mr. Ehrig, let's say this: I held from the testimony that this petitioner did not have an office or agency with an office in the District of Columbia. And then ordinarily I would have ruled that none of the tax was due. But there was no proof of the amount of taxes, of rent that was received. There was a statement in the income tax return, but that is just an admission—it may be an admission against them, but not a proof of what he received.

So there was nothing else I could do but affirm the assessment, not knowing what the rents are. Now that is purely, in that respect—this hearing was to prove what was the amount which they should be charged with for income tax purposes. Now they come in and say we are

228 going to be charged with what the tenants agree

to pay. And on the accrual basis. And that is all they are proving today.

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232 Mr. Colin: Your Honor, may I have this marked at this time, sir?

The Court: I am going to receive it in evidence, Mr. Ehrig, and you have a right to check it against the original if you want to.

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233 The Court: I am going to receive it in evidence as Petitioner's exhibit number 12, for the purpose of showing the item of revenue against which or on which may be based a franchise tax measured by net income, for that purpose and that purpose only. Now you can
234 explore it and go into your issue, if you want to.

(The document referred to was marked petitioner's exhibit number 12 and was received in evidence.)

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247 The Court: You are not fair with the witness. The witness testified that as far as equipment was concerned, in gas stations that they rent to their tenants, the rental covers everything.

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By Mr. Ehrig:

Q. Let's exclude the gas stations from consideration entirely. I am not concerned with them. But these private establishments, Embassy Dairy, Thompson's Dairy, Griffith Consumers and so on——

The Court: He said he loaned them and didn't get rent.

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252 Mr. Colin: Objected to.

The Court: Well, I don't know. It may be a his-

torical question, Mr. Colin. I am going to overrule the objection.

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Mr. Colin: I make the same objection.

The Court: Now, Mr. Ehrig, I was waiting for the bones, as you said.

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256 The Court: How could it be a statutory agent?

Mr. Ehrig: I agree with your Honor that I couldn't be my own agent. What I do for myself is the principal, right.

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261 Mr. Ehrig: No, I long ago stated to your Honor that we are not trying to prove that they physically have an office or an agent here. They may have, but certainly there is nothing in this case to show it. We are riding simply on the estoppel theory one hundred percent.